Supreme Court, U.S.
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No. 02-

IN THE

Supreme Court of the United States

DOUGHBOY RECREATIONAL DIVISION OF HOFFINGER INC., HOFFINGER INDUSTRIES,
Petitioners,

v.

KENNY COYLE,
Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of the State of Oklahoma

PETITION FOR WRIT OF CERTIORARI

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15 pp

QUESTIONS PRESENTED

1. Does the Supremacy Clause of the United States Constitution, through the doctrine of preemption, prevent states from imposing, through common law tort liability, duties on (i) product manufacturers when the Consumer Product Safety Commission has issued findings covering the same risk of injury as is implicated in the state court action when the Commission specifically rejected a warning of the type advocated in the state court action and (ii) manufacturers other than that of the product in question?

2. Does the Constitutionally protected right to due process ensure the right: (i) to consistent application of the rule of law on issues such as defect, duty and proximate cause; and, (ii) to a fair adversarial trial free from the effects of secret, collusive agreements between co-defendants and the plaintiff?

CORPORATE DISCLOSURE STATEMENT

Hoffinger Industries is the parent corporation relevant to these defendants. There are no publicly held corporations with over 10% ownership in the company.

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OFFICIAL AND UNOFFICIAL FINDINGS/OPINIONS FROM UPON WHICH PETITION IS BASED:

1. Journal Entry of Judgment Upon Verdict: In the District Court for Pittsburg County, State of Oklahoma.....8/31/2000;

2. Opinion Affirming Trial Court: Oklahoma Court of Civil Appeals.....2/12/2002;

3. Denial of Motion for Reconsideration: Oklahoma Court of Civil Appeals.....4/26/2002;

4. Denial of Petition for Certiorari.....7/02/2002.

JURISDICTIONAL STATEMENT

Judgment was entered on August 31, 2000 and petitioner's appeal denied on February 12, 2002;

Rehearing was denied in the Oklahoma Court of Civil Appeals on April 30, 2002. Petitioner's Petition for Writ of Certiorari to the Oklahoma Supreme Court was denied on July 2, 2002;

Jurisdiction is conferred on this Court though 28 U.S.C. §1257(a) which states as follows: Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court by writ of certiorari where the validity of a treaty or statute of the United States is drawn in question or where the validity of a statute of any State is drawn in question on the ground of its being repugnant to the Constitution, treaties, or laws of the United States, or where any title, right, privilege, or immunity is specially set up or claimed under the Constitution or the treaties or statutes of, or any commission held or authority exercised under, the United States.

CONSTITUTIONAL PROVISIONS, TREATIES, STATUTES, ORDINANCES, AND REGULATIONS

1) United States Constitution, Article VI, Clause II:

This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any state to the Contrary notwithstanding.

2) United States Constitution, 14th Amendment, Section 1:

All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

2) 16 C.F.R. § 1207 (1976).
-content set out in appendix

3) 41 Fed. Reg. 2742-46
-content set out in appendix

4) 15 U.S.C. 2051

(a) The Congress finds that - (1) an unacceptable number of consumer products which present unreasonable risks of injury are distributed in commerce; (2) complexities of

consumer products and the diverse nature and abilities of consumers using them frequently result in an inability of users to anticipate risks and to safeguard themselves adequately; (3) the public should be protected against unreasonable risks of injury associated with consumer products; (4) control by State and local governments of unreasonable risks of injury associated with consumer products is inadequate and may be burdensome to manufacturers; (5) existing Federal authority to protect consumers from exposure to consumer products presenting unreasonable risks of injury is inadequate; and (6) regulation of consumer products the distribution or use of which affects interstate or foreign commerce is necessary to carry out this chapter. (b) The purposes of this chapter are - (1) to protect the public against unreasonable risks of injury associated with consumer products; (2) to assist consumers in evaluating the comparative safety of consumer products; (3) to develop uniform safety standards for consumer products and to minimize conflicting State and local regulations; and (4) to promote research and investigation into the causes and prevention of product-related deaths, illnesses, and injuries.

STATEMENT OF THE CASE

A. *Factual Summary*

Kenneth Coyle ("Coyle"), who was 21 years of age at the time of this incident, was injured at a late night party when he slid down a slide head first into a shallow, above-ground pool of known depth. Coyle filed suit against the distribution companies who allegedly sold the pool and/or the slide as well as the pool manufacturer. ("Petitioner"). It is undisputed that Petitioner neither manufactured or distributed the slide in question.[1]

On Friday August 27, 1994, Coyle, who lived in Atoka, drove with a friend to Durant, Oklahoma at around 8:00 P.M. (Tr.Vol.I at 21). They drove back to Atoka around 11:00 P.M. and drove to the home of Royce Blaker. Mr. and Mrs. Blaker were out of town and the daughters were having a party. (Tr.Vol.I at 22). There were about 15 people at the party when Coyle arrived; everyone had been drinking and most were standing in the Blakers' above ground pool drinking beer.

After about 30 minutes, during which time Coyle admittedly drank two 12 ounce beers, two friends threw him in the pool. (Transcript of Kenny Coyle deposition, October 19, 1996 at 37-39). When he stood up in the pool, Coyle noticed that the water was around the level of his belly button and became about 2-3 inches shallower as he walked towards the edge of the pool. (Tr.Vol.I at 27). Coyle drank a third beer once he climbed out of the pool. (Transcript of Kenny Coyle Deposition, October 19, 1996 at 42). He admits that after this third beer he was probably impaired. (Transcript of Kenny

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[1] The slide manufacturer was never included as a party by Coyle and the homeowners settled before suit was filed. (Tr.Vol.III at 607; Tr.Vol.I at 203).

Coyle deposition, October 19, 1996 at 155).[2]

Coyle knew from being in the pool that it had a hard bottom and that, at its deepest point, the water level in the pool reached only up to his belly button. (Tr.Vol. I at 27, 37). Coyle knew that above ground pools were not for diving, because there was a danger of hitting one's head on the hard pool bottom. (Tr.Vol.I at 36). He also knew, without the benefit of a warning sign, that he should not dive into water - whether on his own or off a slide - in less than eight feet of water. (Tr.Vol.I at 37-39).

At some point, Coyle decided to use the water slide which the Blakers had separately purchased for the pool (Tr.Vol. I at 26; Transcript of Royce Blaker deposition, July 18, 1996 at 31-32).[3] The first time he used the slide, Coyle slid head first with his hands out in front of him. (Tr.Vol.I at 26). He recalled skipping across the top of the water and then going underwater. His hands, still out in front of him, hit the hard, sandy bottom of the pool. (Tr.Vol.I at 28-29). From this first slide, Coyle knew it was possible that, given the depth of the pool, the first part of his body entering the water could hit the bottom of the pool. (Tr.Vol.I at 46).

This second time Coyle decided to slide down head first with his hands by his side - leading with his head; he had no explanation for why he decided to slide this way. (Tr.Vol.I at

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[2] All evidence regarding alcohol use at the party was made at trial by way of proffer, as the Court excluded all such evidence pre-trial, a decision which is not a subject of review for this Court but which is an important factor in Petitioner's Due Process argument. (Transcript of Proceedings, March 31, 2000 at 5-24).

[3] It is undisputed the slide in question was purchased separately and erected in the homeowner's back yard some years after the pool was originally purchased and placed in the back yard. The homeowner had also erected a deck around the pool after it was purchased and never used the warnings stickers or sign that came with the pool. (Deposition of Royce Blaker, July 18, 1996 at 31-34, 68).

30-31). When he hit the water, Coyle went straight down into the water and hit his head on the same sandy, hard bottom that he hit with his hands minutes earlier. (Tr.Vol.I at 31). Coyle admitted that he could not tell the jury the difference between a dive into shallow water and what Coyle did on the night of his injury. (Tr.Vol.I at 49).

The Consumer Products Safety Commission ("CPSC") promulgated requirements applicable to slide manufacturers. In considering and implementing regulations, the CPSC required slide manufacturers place warning stickers on their slides illustrating the correct and incorrect ways to use this slide. (Tr.Vol.II at 284-285; 290-293). The CPSC also mandated the use of an additional sticker when a slide is placed in less than four feet of water; that sticker was not on the Blaker slide. (Tr.Vol.II at 293-294). It is undisputed that no similar labeling duty was ever imposed by any federal or state agency on pool manufacturers. (Tr.Vol.II at 295). Moreover, the commentary to the CSPC regulations makes clear the CPSC considered and rejected suggestions that regulations prohibit the use of a slide with an above ground pool or with a pool of certain depth. 41 Fed.Reg. 2743-44. Pre-trial, Petitioner moved for summary judgment orally on the grounds that the claims against Petitioner were preempted by the CPSC regulations. (Trancript of Proceedings, May 31, 2000, pp. 53-57). That motion was denied by the trial court at that time. (Trancript of Proceedings, May 31, 2000, p. 67).

Regardless, some of the originally federally required warning stickers were on the slide on the night in question. These stickers - which were placed at eye level on the ladder - indicated that a head first belly slide was not a proper way to use the slide. However, Coyle did not see those warnings, because the Blakers' backyard was not lit well enough for Coyle to see those warnings and because he admittedly was not looking for warnings as he was climbing the slide. (Tr.Vol.I at 44). However, he testified that he would not have slid as he did

if he had seen the warning stickers. (Tr.Vol.I at 47).

This case originally included three defendants - Petitioner; Ward Pools and Spas, Inc, the pool distributor; and South Central, the slide distributor. Prior to trial, and kept secret until counsel for Petitioner raised the issue on the first morning of trial, the other two defendants reached a settlement agreement with Coyle in the form of a high/low agreement. (Transcript of Proceedings, May 31, 2000 at 32-39, 58, Tr.Vol.II at 346). Upon learning of that agreement, Petitioner moved for severance prior to trial, so that the allegations against Petitioner could be tried separately from the defendants who already had an agreement in place with Coyle. The trial court denied that motion. (Transcript of Proceedings, May 31, 2000 at 48-49). Petitioner's request for a mistrial made during trial were similarly denied. (Tr.Vol.I at 204-208).

During the trial, the following events transpired: no jury charges or motions in limine were filed by the other defendants (Transcript of Proceedings, May 31, 2000 at 32-33); the other defendants supported Coyle's motions in limine to exclude evidence of Coyle's alcohol use and evidence of the general atmosphere at the party (Transcript of Proceedings, May 31, 2000 at 15-20, 62-63); the pool distributor's representative, Kelly Ward, expressed his belief that the pool was defective, which the trial court noted was essentially an admission of liability (Tr.Vol.I at 195, 208); Coyle's "cross-examination" of Ward did not elicit any of the damaging testimony that was uncovered against Ward during his deposition but focused solely on information Ward was given by Petitioner (Tr.Vol.I at 183-196, 204); Ward's attorney declared Petitioner's trial witness a hostile witness and aggressively attempted to force him to admit that the pool warning was defective, even though his client's liability was strictly derivative of Petitioner's (Tr.Vol.I 142-154); those defendants' attorneys asked no questions of Coyle on cross-examination (Tr.Vol.I at 49-50, 62); Coyle did not elicit any testimony from its expert critical

of South Central and attempted to prevent Petitioner from doing so, even though that expert's testimony was the only evidence critical of South Central, a named defendant. (Tr.Vol.I at 237-280; Tr.Vol.II at 281-283).

Then, after Coyle completed the liability phase of his case, it was announced that Coyle had reached a final settlement agreement with the other defendants. (Tr.Vol.II at 331-334). Petitioner moved for a mistrial or/in the alternative, moved for the trial court to advise the jury of the high/low agreement and to be allowed to examine witnesses regarding that agreement. All these requests for relief were denied. (Tr.Vol.II at 334-337, 342-359). During the court's ruling on this motion, it commented on its displeasure of Petitioner's mediation position and noted that the only evidence against Ward was his admission that he sold a defective product, and the only evidence against South Central was that elicited from Coyle's expert by Petitioner. (Tr.Vol.II at 352-356).

B. *Procedural History*

Petitioner filed for summary judgment on the issues of defect and open and obvious danger and the trial court denied that motion on March 29, 2000. That motion was renewed pre-trial. At that time, Petitioner moved for summary judgment orally on the grounds that the claims against Petitioner were preempted by the CPSC regulations. (Transcript of Proceedings, May 31, 2000, pp. 53-57). Both the renewed motion and the new preemption motion were denied by the trial court at that time. (Trancript of Proceedings, May 31, 2000, p. 67). Also pre-trial, Petitioner inquired into the secret settlement agreement, requesting, among other relief, a motion for severance and specifically raising concerns about the fairness and sanctity of the proceedings in light of the lack of adversarial relationship between Coyle and the other trial defendants. (Id. at 32-49). That motion was denied by the trial court at that time. (Id. at 48-49).

The motion for a mistrial based on the collusion

between Coyle and the other trial defendants was renewed during trial once the settlement with those defendants was announced. (Tr. Vol. II, pp.332-359). The trial court also refused all requests that the jury be informed of the agreement and refused to allow witnesses to be cross-examined on its existence. Id. After the close of Coyle's case-in-chief, Petitioner renewed its motions as to the existence of defect, causation and preemption. (Tr. Vol. III, p. 586, 589-590). The trial court denied those motions. (Tr. Vol. III, p. 588). All grounds were again renewed at the close of evidence and denied once again by the trial court. (Tr. Vol. III, pp.675-677).

Coyle was awarded $2 million by the jury and a judgment was entered on Coyle's behalf on August 31, 2000. Petitioner timely filed its petition in error pursuant of Oklahoma procedure on September 29, 2000 and filed its initial appeal brief on May 24, 2001, renewing all previously stated motions based on preemption, defect, proximate cause, and denial of fair trial based on the collusion. The Oklahoma Court of Civil Appeals denied Petitioner's appeal by a 2-1 vote on February 12, 2002; Petitioner's motion for reconsideration was denied by that same Court on April 30, 2002. Petitioner then filed a petition for certiorari with the Oklahoma Supreme Court, which was denied by a vote of 5-4 on July 2, 2002. This appeal follows, 90 days following the denial of the petition for certiorari to the Oklahoma State Supreme Court.

ARGUMENT AND CITATION OF AUTHORITY

A. *The State Courts Below Erred in not Finding Coyle's Claims Barred by the Doctrine of Preemption.*

A fundamental principle of the Constitution is that Congress has the power to preempt state law. Preemption is most easily identified where Congress has included within a law an express provision governing preemption. Preemption will also be implied in two circumstances: 1) where Congress

has adopted such a comprehensive regulatory scheme as to have essentially removed the field from the state realm; and 3) where state law directly conflicts with federal law or interferes with the achievement of federal objectives. See English v. General Elec. Co., 496 U.S. 72, 78-79 (1990). An implied conflict can take two forms - it may occur when it is "impossible for a private party to comply with both state and federal requirements, . . . or when state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." Association of Int'l Automobile Mfrs., Inc. v. Abrams, 84 F.3d 602, 607 (2nd Cir. 1996); *see also* Hines v Davidowitz, 312 U.S. 52, 66-67 (1941); Crosby v. National Foreign Trade Council, 530 U.S. 363 (2000).

Under the Consumer Product Safety Act (CPSA), the Consumer Product Safety Commission (CPSC) adopted a standard entitled "Safety Standard for Swimming Pool Slides," which was "intended to reduce the unreasonable risk of injury associated with swimming pool slides . . . by warnings to be attached to the slide showing proper techniques for use of the slide and to be provided to the user-installer, and by recommending minimum water depths depending on the height of the slide and the age of the user."[4] *See* 16 C.F.R. § 1207 (1976).The fact that one of the stated purposes of the standard was to recommend *pool water depths* and the that the CPSC considered and rejected a suggestion that slides should not be placed with pools of certain depths illustrates that the CPSC clearly foresaw that this standard would impact both the pool and slide industries. Therefore, preemption analysis is a proper issue to address in a case involving an injury caused by the use of a slide with an above-ground pool. See 41 Fed. Reg. 2744-2745. Despite this specific consideration and rejection of such a prohibition, in the case at bar, Coyle's argument to the jury

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[4] See Safety Standard for Swimming Pool Slides, 41 Fed. Reg. 2743.

was that Hoffinger's warnings were defective for *not* employing just such a prohibition.

These standards dictated how swimming pool slides are to be designed, manufactured, and installed, and mandated that certain warnings be put on slides. The Commission clearly contemplated proposed regulations that slides would be put with above and below ground pools; §1207.1(a)(2) makes the standard applicable to slides used with "all swimming pools, whether in-ground, on-ground, or above-ground." Specifically with regard to warnings, §1207.7 when enacted mandated for manufacturers of slides the use of certain warning stickers on all slides, and mandated the use of additional warnings on slides placed in 4 feet or less of water. [5] These regulations continue to provide guidance with respect to the dangers associated with the misuse of swimming pool slides; the CPSC has never enacted any regulation mandating a prohibition against use of slides with above ground pools.

Under the CSPC standards, the **entire** burden for warning slide users of the dangers attendant to that use - whether the slide was connected to an above-ground or below-ground pool - was placed on the slide manufacturers, who were to include intended use instructions with the slide and were to permanently attach the mandated labels and warnings on the slide at the time of manufacture. 16 C.F.R. §1207.7 (1976). In explaining the process the Commission undertook to arrive at the standards it eventually adopted, which included the consideration of written comments from interested parties, the Commission made clear that it had **considered and rejected** a proposal to mandate the placement of other warning signs

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[5] The CPSC's decision to place the burden warning on slide manufacturers is consistent with widely embraced case principles that one is not required to warn of dangers associated with products manufactured by another. See, e.g., Spencer v. Ford Motor Co., 141 Mich.App. 356, 367 Nw2d 393 (1985).

around the pool area in addition to those to be placed on the side itself. The CPSC determined the presence of additional signage could dilute the effectiveness of the regulations' requisite warnings -- on the slide itself:

> Another comment suggests that the instructions for the intended use of slides should be prominently displayed in the slide or pool area . . .The Commission has required the permanent attachment on the slides of signs conveying the information deemed to be most important in preventing injuries occurring in the use of the slides. The considerable information contained in the intended-use instructions that is not presently required to be attached to the slide would have to be provided on a separate sign to be displayed elsewhere, according to this suggestion. **This separate sign could tend to dilute or reduce the effectiveness of the signs on the slides.** Accordingly, the suggestion has not been adopted.

41 Fed. Reg. 2746. In the case sub judice, the question, therefore, is whether, in light of the CPSC's rejection of a regulatory scheme -- as Coyle advocated at trial -- prohibiting use of slides with above ground pools, Coyle can recover damages in state court against a pool manufacturer for failing to warn of the dangers of using a later-added slide (manufactured by a totally separate corporation) with the Petitioner-manufactured above ground pool.[6]

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[6] In the case sub judice, Thomas Masterson, president of S.R. Smith, the slide manufacturer impleaded below as a third party defendant, acknowledged the regulatory scheme as enacted by the CPSC in 1976 and applied to slide manufacturers. (Tr. Vol. III; p.606). Plaintiff's expert, Samuel Glucksberg, in reference to the CPSC standards concerning slide warnings and use, testified these regulations apply to and set the legal requirements in the area for slide manufacturers. (Tr. Vol. II; p.290-91;

This Court has repeatedly held that common law and statutory tort actions are subject to the same preemption analysis as are state laws or regulations because "it is well established that a state regulation can be as effectively exerted through an award of damages as through some form of preventative relief." Cipollone v. Liggett Group, Inc., 505 U.S. 504, 521; Carstensen v Brunswick Corp., 49 F.3d 430, 432 (8th Cir. 1995), *cert. denied*, 116 S. Ct. 182 (1995). In fact, this Court found the claims brought by the petitioner in Geier v. American Honda Motor Co., Inc., 529 U.S. 861 (2000) to be impliedly preempted, even though those claims were brought through a lawsuit as opposed to a state law or regulation. This Court has never had the opportunity to address these precise issues in the context of a claim involving the CPSA. Several Federal Circuit Courts and lower State Courts have split on the issue of whether the CPSA expressly preempts common law tort claims that would have the effect of creating a state standard.[7]

Even if the common law claims are not expressly preempted, however, the question remains whether all such claims must be analyzed under ordinary *implied* preemption principles. This Court has held generally that all common law

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295) In Aqua Slide N' Dive Corporation v. The Consumer Product Safety Commission, 569 F.2d 831 (5th Cir. 1978), the court set aside certain standards of the CSPC as to warnings and slide use. Id. At 844. The court took no issue with the CPSC's findings as to concerns about dilution of warnings and left undisturbed the CPSC's rejection of regulations prohibiting use of slides with above ground pools. The findings of the CPSC remain in the regulations; replacement standards in the specified areas have yet to be promulgated to date.

[7] Carlson v BIC Corp., 89 F.3d 832 (6th Cir.1996) (Unpublished table opinion); Moe v. MTD Products, 73 F.3d 179 (8th Cir.1995); Frazier v Hendringers & MTD Prods., Inc., 96 F. Supp.2d 486 (E.D.Pa.2000); Cortez v. MTD Prods., Inc., 927 F.Supp. 386 (N.D.Ca.1996)

tort claims are subject to such analysis but has never specifically analyzed the CPSA to determine if some reason exists why it should be exempt from such analysis. *See* Id. at 869. It is relevant for this Court to consider that the claim upon which liability was based in the case at bar was strict liability as opposed to mere common law tort.

The Ninth Circuit Court of Appeals, has used this Court's ruling in Geier to hold that no common law tort claim implicating the CPSA can ever be expressly or impliedly preempted. Leipart v Guardian, 234 F. 3d 1063 (9th Cir. 2000). With regard to express preemption, the Ninth Circuit stated that this Court in Geier "concluded that, under the NTMVSA, a preempted state law "standard" was not the same thing as a state common-law tort "requirement." Id. at 1069-1070. In truth, however, this Court declined to engage in such an analysis, stating that it "need not determine the precise significance of the use of the word 'standard,' rather than 'requirement,'" because of the wording of the saving clause in the statute. Geier 529 U.S. at 867-868.

More importantly, the Ninth Circuit, relying on Geier, effectively held that under the CPSA, no common law tort claim can ever be impliedly preempted. In so holding, the Ninth Circuit used this Court's supposed ruling in Geier that "standards" do not include "requirements" imposed pursuant to a state common law tort claim. As such, and since the CPSA was designed "to develop uniform safety *standards* and to minimize conflicting State and local *regulations*," a tort based *requirement* can never, in the eyes of the Ninth Circuit, interfere with the goal of setting uniform standards. Leipart, 234 F. 3d at 1070-1071. Preemption under the CPSA, in the Ninth Circuit's view, is impossible.

The Ninth Circuit's ruling misstates this Court's holding in Geier - which, after all, rested its decision on implied preemption of a common law state tort claim - and creates a significant split between it and this Court, as well as

with other circuits. Further review of the case sub judice would allow the Court an opportunity to clarify its holding in Geier, to correct the misapplication of that holding by the Ninth Circuit, and to decide an issue which is of great importance to all product makers in this county - whether under the CPSA a common law or statutory tort claim is subject to preemption analysis?

Petitioner contends there is no support whatsoever in the CPSA for a finding that common law tort claims should be excluded from implied preemption analysis and further contends that the lower courts in the case before the Court erred in not finding the claims against petitioner barred under such implied preemption analysis in this case. In the case sub judice, Coyle's entire argument against Petitioner was that its warnings were defective in failing to warn consumers or retailers not to put slides with above ground pools. The CPSC considered and specifically rejected just such a ban on the placement of slides with pools of a certain depth, finding that such a ban could actually increase the hazard of drowning to small children.[8] The CPSC also determined additional signage — as advocated by Coyle's expert below — would only serve to weaken the impact of the warnings on the slide itself. For a state court to impose liability on a pool manufacturer in direct contravention of the CSPC is to destroy the very protections the CPSC was attempting to afford *product users*. Inconsistent requirements imposed by state tort law would pose a significant obstacle to both a specific CPSC objective - warning slide users of the correct way to slide into shallow water, as described in the

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[8] This Court has, in other contexts, held that the informed decision of a federal agency charged with regulation of certain products or activities to forgo regulation in a given area "may imply an authoritative federal determination that the area is best left unregulated, and in that event would have as much pre-emptive force as a decision to regulate." Arkansas Elec. Coop. Corp. v. Arkansas Pub. Serv. Comm'n., 461 U.S. 375, 384 (1983)

specific regulation - and of the general stated purposes of the CPSC - "to develop uniform safety standards for consumer products and *to minimize conflicting State and local regulations*." 15 USC 2051(b)(3)(emphasis added).

The danger presented to consumers and the uncertainty created for pool manufacturers presented by Coyle's position is obvious. While the federal government has informed the industries that additional warning signs might actually endanger consumers by confusing them, state courts may impose liability on the *pool* industry if it fails to provide those additional warnings *about slides*. Facing possible tort action, the industry will then begin including additional warnings with its pools and, risking reduced effectiveness of the federally mandated and prescribed warnings, possibly endanger consumers and users. This very circumstance was foreseen and addressed by the CPSC when the suggestion for additional signage was discarded. In the absence of this Court's enforcement of preemption, the pool and slide industries will be faced with lawsuits whether they complied with or ignored the CPSC's reasoning. The result would not be the uniform safety standards envisioned by the Congress when it created the CPSC, but the hodgepodge of standards from state to state which the CPSA and preemption were formulated to avoid.

As illustrated above, Coyle's theory against Petitioner clearly conflicts with the CPSC's regulations and its decision, and the reasoning behind that decision, to impose upon slide manufacturers exclusively the duty to warn consumers of the dangers of slide usage. As such, claims such as those of Coyle are preempted as a matter of law. Granting this petition would not only allow the Court to correct the misapplication of the preemption doctrine in this specific case but would also allow this Court to clarify the scope of that doctrine and the application of implied preemption analysis to claims implicating the CPSC. Accordingly, this Court should grant this petition and afford the parties an audience on these issues.

B. *The State Courts Below Violated Petitioner's Federally Protected Due Process Rights When They Allowed Trial to Proceed But Prohibited Petitioner From Introducing Evidence of The Bias and Prejudice of the Co-Defendants Due to the Pre-Trial Settlement Between Coyle and the Other Trial Defendants.*

The procedural facts at once support Petitioner's arguments with regard to preemption while demonstrating the usurpation of the due process clause in proceedings below. This case originally included three defendants - Petitioner; Ward, the pool distributor; and South Central, the slide distributor. Prior to trial, and kept secret until — and even after — counsel for Petitioner became suspicious and raised the issue on the first morning of trial, the other two defendants reached a settlement agreement with Plaintiff in the form of a high/low agreement. (Transcript of Proceedings, May 31, 2000 at 32-39, 58, Tr.Vol.II at 346). Upon suspicion of that agreement, Petitioner moved for severance prior to trial. The trial court denied that motion. (Transcript of Proceedings, May 31, 2000 at 48-49). Petitioner's multiple requests for a mistrial made during trial, (and after Petitioner's purported co-defendants (at the end of the liability phase of the trial) exited at a choreographed stage of the trial/play) were similarly denied. (Tr.Vol.I at 204-208).

During the trial, the following events transpired: no jury charges or motions in limine were filed by the other defendants (Transcript of Proceedings, May 31, 2000 at 32-33); the other defendants supported Plaintiff's motions in limine to exclude evidence of Plaintiff's alcohol use and evidence of the general atmosphere at the party (Transcript of Proceedings, May 31, 2000 at 15-20, 62-63); the pool distributor's representative, Kelly Ward, expressed his belief that the pool was defective, which the trial court noted was essentially an admission of liability (Tr.Vol.I at 195, 208); Plaintiff's "cross-examination" of Ward did not elicit any of the damaging testimony that was

uncovered against Ward during his deposition but focused solely on information Ward was allegedly given by Petitioner (Tr.Vol.I at 183-196, 204); Ward's attorney declared Petitioner's trial witness a hostile witness and aggressively attempted to force him to admit that the pool was defective, even though his client's liability was strictly derivative of Petitioner's (Tr.Vol.I 142-154); those defendants' attorneys asked no questions of Plaintiff on cross-examination (Tr.Vol.I at 49-50, 62); Plaintiff did not elicit any testimony from its expert critical of South Central and attempted to prevent Petitioner from doing so, even though that expert's testimony, even upon deposition, was the only evidence critical of South Central, a named, and purportedly actual, defendant. (Tr.Vol.I at 237-280; Tr.Vol.II at 281-283).

After Plaintiff completed the liability phase of his case, it was announced that Plaintiff had reached a final settlement agreement with the other defendants. (Tr.Vol.II at 340). Petitioner moved for a mistrial or/in the alternative, moved for the trial court to advise the jury of the high/low agreement and to be allowed to examine witnesses regarding that agreement. All these requests for relief, despite multiple requests, were denied. (Tr.Vol.II at 336, 342-359). During the court's ruling on this motion, it commented on its displeasure of Petitioner's mediation position and noted that the only evidence against Ward was his admission that he sold a defective product, and the only evidence against South Central was that elicited from Plaintiff's expert by Petitioner. (Tr.Vol.II at 352-356). A review of the record demonstrates the trial court's disdain for Petitioner and its inclination to strike at and punish Petitioner in its no-liability position.

It is clear that "any pre-trial agreement between plaintiff and a defendant must be revealed to all parties and the court prior to trial and to the jury in some appropriate degree to be decided by the trial court." Hoops v. Watermelon City Trucking, Inc., 846 F.2d 637 (10th Cir. 1988). In Hoops, the

Plaintiff and one defendant in a multi-defendant case reached a "High/Low Agreement" that was not disclosed until the dayof trial. The remaining defendant argued that it had been prejudiced due to the last minute disclosure of that agreement. The 10th Circuit disagreed, finding no prejudice in the late disclosure of the agreement. However, central to its finding of no prejudice was the fact that *the remaining defendant was allowed to cross-examine the Plaintiff regarding the agreement and could argue its effect to the jury.* Id., at 641.[9]

Petitioner was denied that opportunity in the present case. The trial court denied Petitioner's repeated requests to inform the jury of the arrangement reached by the parties pre-trial and to cross-examine witnesses regarding its effect. For example, Petitioner should have been allowed to cross-examine Kelly Ward regarding the settlement agreement and the jury should have been allowed to consider his admission that he sold a defective product - an admission of liability - in light of that agreement and to further consider how the fact that Ward's liability was limited factored into that admission. Petitioner was denied due process of law because the trial court failed to grant a mistrial or severance; failed to disclose the pre-trial settlement to the jury; and, prohibited Petitioner from cross-examining witnesses regarding their bias and prejudice due to the settlement.

Petitioner's due process rights were clearly destroyed "since a defendant must be afforded reasonable opportunity to refute grave allegations brought against [it] in a civil suit." Ellis v. Capps, 500 F.2d 225, 226 (5th Cir. 1974):

> Cordoning off a highly relevant area of inquiry such as the bias and prejudice of a complainant is repugnant to the principle of a fair trial. The

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[9] Other states have also held that a settlement agreement can be disclosed during cross-examination to show bias. Perry v. Magic Valley Regional Medical Center, 995 P.2d 816 (Idaho, 2000).

> permissible leeway for a defendant's strategems is broad indeed. ... Evidence to show bias or interest of a witness in a cause covers a wide range and the field of external circumstances from which probable bias or interest may be inferred is indefinite. The rule encompasses all facts and circumstances which, when tested by human experience, tend to show that a witness may shade his testimony for the purpose of helping to establish one side of the cause only. Facts wholly immaterial, or prejudicial to one of the parties on the main issue, may be material as affecting the credibility of a witness.

Id.

In Ellis, the defendant was a prison inmate who objected to the introduction of evidence regarding his misbehavior while in prison in his suit against the warden for unconstitutionally relegating him to solitary confinement. The 5th Circuit found that the evidence was admissible to show the defendant's "bias and prejudice against the warden as head of the institution to which the defendant was so ill-adjusted." Id. "To hold otherwise would raise serious due process problems ... ." Id.

Petitioner was denied procedural due process since it was prohibited from cross examining the other defendants regarding their bias and prejudice in favor of the Plaintiff in light of the "High/Low" agreement. Not only should the trial court have allowed the jury to know about the pre-trial agreement between the Plaintiff and the other defendants, the trial court erred in refusing Petitioner's repeated requests for mistrial due to the unfair prejudice which resulted from the existence of this secret agreement. An analysis of the record in this case clearly shows that Petitioner was denied due process.

The record discloses that the attorneys for Ward Pools and South Central took the same position as Plaintiff on every major evidentiary issue that arose during the trial, including on the admissibility of evidence of the Plaintiff's alcohol use. Kelly Ward, whose company's liability was strictly derivative of Petitioner's, admitted to selling a defective product. Ward's attorney subjected Petitioner's representative to a cross-examination designed to have that witness admit that the pool warnings were defective, although that would -- at least absent and pretrial agreement from counsel -- result in the imposition of liability on Ward Pools. No direct evidence whatsoever was elicited by the Plaintiff against South Central; Plaintiff did not elicit any criticism of South Central by his expert witness and fought Petitioner's attempts to discuss those criticisms before the jury. A review of these specific incidents and the entire record prior to the release of the other defendants shows a total absence of any real controversy between those defendants and Plaintiff and illustrates that the alignment of the parties had been altered in a way which irreparably damaged Petitioner's right to a fair trial.

Petitioner is not alone in its outrage in this regard. In his dissent in the case at bar, Judge Rapp of the Oklahoma Court of Civil Appeals was "of the opinion that the existence of the high/low agreement of the other defendants served to destroy [Petitioner's] ability to achieve a fair trial." He further opined:

> This agreement between the other defendants, known to the trial court, created and allowed the existence of sham defendants before the court and destroyed the very crucible of a trial designed to achieve the truth.

Rapp, J., dissenting.

"It is a fundamental to a full and fair [trial] required by

the due process clause that a litigant have an opportunity to be confronted with all adverse evidence and to have the right to cross-examine available witnesses." Nevels v. Hanlon, 656 F.2d 372 (8th Cir. 1981) citing Greene v. McElroy, 360 U.S. 474 (1959). "Where a party is precluded from exercising this fundamental right, the [trial] procedure is constitutionally defective, ... and cannot be excused as harmless error." Id. [cits. omitted].

In Nevels, Nevels appealed his termination by his employer which was affirmed by the Commissioner of Labor for the State of Nebraska. On appeal, the Eighth Circuit found that Nevels' right to procedural due process was denied based on the Labor Commissioner's ex parte communications with Nevels' supervisor concerning Nevels' attitude and performance. Specifically, the Eighth Circuit found that the ex parte communication denied Nevels his right to be confronted with all adverse evidence and to cross-examine witnesses.

Similarly, Petitioner was denied procedural due process since it was not allowed to address the adverse evidence concerning the "High/Low" agreement. The pre-trial agreement between the Plaintiff and the other defendants ruined the adversarial process and Petitioner's chances of a fair trial. Petitioner acknowledges the importance of according deference to a jury verdict on appeal. However, the proceedings below were befouled by collusion and secrecy to the point that the purity of the elements of an appropriate and truthful verdict were tainted. Contrary to the rulings below, depravation of due process rights can never be harmless error. Rulings championing closure over the constitutional rights to due process and a fair trial are false idols unworthy of the reverence shown them by the lower courts in the present matter.

Thus, the trial court erred in failing to grant a mistrial and a new trial should be granted to remedy this destruction of the adversarial process and denial of Petitioner's right to procedural due process.

C. *The Trial Court's Judgment in Favor of Coyle Violated Due Process as Coyle Failed to Establish an Essential Element of His Claim Against Petitioner.*

A judgment supported by no evidence on an essential element violates due process. Vachon v. New Hampshire, 414 U.S. 478 (1974). The rule that process is violated when there is no evidence to support a finding has been applied in a variety of contexts and is not limited to criminal convictions. In United States ex rel. Vajtauer v. Comm'r of Immigration, 273 U.S. 103 (1927), this Court held that the deportation of an alien on charges unsupported by any evidence is a denial of due process. In Wood v. Strickland, 420 U.S. 308 (1975), the "no evidence" rule was applied to public school disciplinary proceedings where the Court stated that an individual is denied due process when suspended in the absence of any evidence establishing a violation of a school regulation. The "no evidence" rule applies here since the record is totally devoid of any evidence that the swimming pool was defective.

The elements which must be proven in order to recover under a theory of products liability under Oklahoma law are as follows:

> First of all, plaintiff must prove that the product was the cause of the injury; the mere possibility that it might have caused the injury is not enough . . .
>
> Secondly, plaintiff must prove that the defect existed in the product, if the action is against the manufacturer, at the time that the product left the manufacturer's possession and control . . .
>
> Thirdly, plaintiff must prove that the defect made the article unreasonably dangerous to him or to his property as the term 'unreasonably dangerous' is above defined.

Kirkland v. General Motors Corporation, 1974 OK 52, ¶ 29-31, 521 P.2d. 1353

These elements, and the definition of "unreasonably dangerous," are taken from the Restatement of Torts, 2d, Section 402-A, which states that for a product to be unreasonably dangerous, it:

> must be dangerous to an extent beyond that which would be contemplated by the ordinary consumer, with the ordinary knowledge common to the community as to its characteristics.

Bruce v. Martin-Marietta Corp., 544 F.2d 442, 447 (10th Cir. 1976). The above language has come to be known as the "consumer contemplation test" by courts in states (including Oklahoma) which follow the Restatement's formulation of this test.

Applying the "consumer contemplation test" to the facts of the instant case reveals that there is no evidence to support the judgment of the trial court that the warnings provided with the swimming pool at issue in this case were defective. In order to establish that the warnings were defective, the Plaintiff must show that the pool was thereby rendered less safe than would be expected by an ordinary consumer. The question, therefore, is what an ordinary consumer expects when he purchases or uses an above-ground swimming pool of a depth of 3 ½ feet. An ordinary consumer would expect to be able to swim and wade in a pool of such depth. However, an ordinary, objective consumer would not expect to be able to enter the pool headlong with his hands by his side without exposing himself to injury, particularly when that consumer already knew how shallow the pool was. Such an expectation is completely unreasonable based on common sense and life experience, not to mention the plaintiff's specific experience with this particular

pool on the night in question.[10]

This case falls squarely within the reasoning cited in Kirkland in which the consumer contemplation test is discussed. That the plaintiff alleges a defective warning in no way makes the product dangerous to an extent beyond that contemplated by a user with ordinary knowledge of the characteristics of a shallow pool. No ordinary consumer, as that term is defined in the Restatement, would believe that he could safely enter a pool head first when that pool contains no more than 4-5 feet of water, regardless of whatever additional products had been placed nearby by the owner. Based on the total absence of any evidence that the warnings provided with the pool were defective, the trial court's rulings and judgment have deprived Petitioner of its procedural due process rights.

Respectfully Submitted,

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[10] Of some import is the fact the slide was not a component of the pool when manufactured, given the fact that the defect, to be actionable, must have existed at the time the product left the manufacturer. As to the Plaintiff's allegations that failing to warn purchasers not to put slides with above-ground pools, Petitioner points out that in no diving case has any court found that the failure to inform purchasers not to put diving boards or other apparatus with these pools was a defect which made the product unreasonably dangerous, even though the manufacturers takes the position that one should not dive into the pools. Certainly, as indicated above, the Consumer Products Safety Commission has defined the appropriate entities to control risks associated with slides - slide manufactures.

IN THE COURT OF CIVIL APPEALS
STATE OF OKLAHOMA
DIVISION IV

KENNY COYLE,

Plaintiff/Appellee,

vs.

DOUGHBOY RECREATIONAL DIVISION OF HOFFINGER, INC., HOFFINGER INDUSTRIES,

Defendant/Appellant.

Filed
Court of Civil Appeals
State of Oklahoma
Feb 12, 2002
Case No. 95,304
Not for Official Publication

APPEAL FROM THE DISTRICT COURT OF
PITTSBURG COUNTY, OKLAHOMA

HONORABLE THOMAS M. BARTHELD, TRIAL JUDGE

AFFIRMED

Lynn B. Mares
Ed Abel
Steven T. Horton
ABEL, MUSSER, SOKOLOSKY,
MARES & KOURI
Oklahoma City, Oklahoma
Plaintiff/Appellee

Timothy J. Buckley III
Chad D. Graddy
FINLEY & BUCKLEY, P.C.
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and

Tim Maxcey
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McAlester, Oklahoma
For Defendant/Appellant

OPINION BY RONALD J. STUBBLEFIELD, PRESIDING JUDGE

This is an appeal from judgment on jury verdict entered in favor of Plaintiff, Kenny Coyle, who sustained a serious disabling injury when he slid head first down a slide into an above-ground swimming pool. Plaintiff brought the product liability action against the pool's manufacturer, Doughboy Recreational Division of Hoffinger, Inc., Hoffinger Industries (collectively referred to as Hoffinger).[1]

I. FACTS AND PROCEDURAL HISTORY

The record reveals that, on August 27, 1994, sometime after 11:00 p.m., the twenty-one year-old Coyle and his friend, Jason Page, after a late dinner, arrived at the home of the Blaker family. Mr. and Mrs. Blaker were out of town, and their daughters were having a party. Between fifteen and twenty-five people were there when Plaintiff arrived, and several of them were standing in the Blaker's above-ground swimming pool drinking beer. Plaintiff had never visited the home before.

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[1] Plaintiff also sued Ward Pools (Ward), the authorized dealer that sold the Hoffinger pool and later sold a slide – manufactured by another company – as an accessory to be installed with the Hoffinger pool. Plaintiff also named the distributor of the pool slide, South Central Pool Supply, Inc. (South Central) as a party defendant. During trial, Plaintiff reached a settlement agreement with the pool and slide distributors, leaving only his claims against Hoffinger for submission to the jury.

He and his friend had not originally intended to swim.

Around midnight, Plaintiff and his friend were thrown into the pool while they were fully dressed. When he stood up, Plaintiff, who was six-foot-one inches tall, noticed that the water level in the pool was at about the level of his navel and became about two to three inches shallower as he walked towards the pool's edge. After Plaintiff climbed out of the pool, he changed into some boxer shorts that were offered to him and a few minutes later decided to use the pool slide.[2]

Plaintiff completed his first slide without incident. He went down in a head-first position "belly slide" with his arms outstretched in front of him. He testified that he "skimmed across the water for a little ways" and that his hands had "skimmed the bottom of the pool," but not hard enough to cause him any concern. After completing his first slide, Plaintiff immediately climbed out of the pool and returned to the slide. He then went down in a head first "belly slide," with his arms at his side, a type of slide performed by others at the party, including his friend Jason. Plaintiff's head struck the bottom of the pool, and he was unable to move. Others had to pull him to the surface. He received emergency medical care, but had sustained a spinal injury that rendered him quadriplegic.

Plaintiff had consumed three beers before the tragic accident. At a hearing on the day before the case was to go to trial, the parties argued various motions. Plaintiff had filed a motion in limine seeking to exclude any evidence regarding his consumption of alcohol. He claimed that, because there was absolutely no evidence that he actually was intoxicated at the time of his injury – no blood alcohol test or witness testimony that he appeared impaired – he would be denied a fair trial if such highly speculative and extremely prejudicial evidence was

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[2] The Blaker's had purchased the slide separately and erected it about one year after purchasing and placing the pool in their backyard.

presented to the jury. Plaintiff also emphasized that because he asserted no negligence claim and sought recovery solely under products liability theory, his contributory negligence, if any, was not at issue.

Hoffinger objected to the motion, asserting that the alcohol evidence dealt directly with causation. Hoffinger argued that although Plaintiff denied being intoxicated, his own deposition testimony might be viewed as indicating some awareness of possible impairment. It was Hoffinger's position that the jury should determine whether Plaintiff's "bad judgment fueled by alcohol" proximately caused the accident or caused him to misuse the product. Neither Ward nor South Central objected to the motion, with their counsel admitting that they had found no witness that would testify Plaintiff was intoxicated, and expressing concern about prejudicial error requiring reversal where it could not be said that the proximate cause of the accident was alcohol. The trial court ruled that all evidence of Plaintiff's alcohol consumption on the night of his injury should be excluded.

Hoffinger sought a continuance or alternatively severance of Plaintiff's claim against it from the claims against Ward and South Central. Hoffinger claimed it was "caught by surprise" by those parties' apparent alignment with Plaintiff, and was concerned about a possible high/low agreement or some other agreement in place between Plaintiff and the two parties. Hoffinger also re-urged a motion for summary judgment, and, for the first time, argued that Plaintiff's claims against it were preempted by federal law. The trial court denied Hoffinger's pre-trial motions.

During trial, Hoffinger made an offer of proof on the alcohol issue. However, the trial court did not change its ruling on the subject.

At approximately the point when Plaintiff completed the liability portion of his case, Ward and South Central announced to the trial court that they had reached settlements

with Plaintiff. Hoffinger moved for a mistrial, or in the alternative that the trial court advise the jury of a previous high/low agreement between the settling parties, and allow it to examine witnesses regarding the agreement. According to Hoffinger, the high/low agreement was an incentive for Ward and South Central to "point [a] finger at Hoffinger Industries," and to take a position in the litigation that was not "adversarial" with Plaintiff. The trial court denied the motions, stating that it had reviewed the settlement agreement and found no fault with it, or with the conduct of counsel for the settling parties.

The jury returned a verdict in favor of Plaintiff, on a general verdict form, awarding damages in the amount of $2 million. The trial court determined that pre-judgment interest should be taxed against Hoffinger in the amount of $827,046.92, and added that amount to the verdict. The trial court further determined that Hoffinger was entitled to a $550,000 set-off from the judgment, the amount representing the total sum Plaintiff received from pre-trial settlement with the homeowners, the Blakers, and mid-trial settlement with Ward and South Central. Hoffinger appeals.[3]

II. PROPOSITIONS OF ERROR

Hoffinger raised a total of fifteen propositions of errors in its petition in error, several of which it failed to subsequently brief. Propositions of error set forth in the petition in error, which are not briefed, are deemed waived. *Warner v. Hilcrest Med Ctr.*, 1995 OK CIV APP 123, ¶6, 914 P. 2d 1060, 1063d 1060, 1063 *cert. denied,* 519 U.S. 861 (1996). The propositions of error preserved for review of Hoffinger include alleged trial court errors in (1) submitting the issues of defect and duty to warn to the jury, (2) admission and exclusion of evidence, (3) denial of its motion for severance and/or mistrial, (4) failure to find Plaintiff's claims preempted by federal law, and (5) calculation of pre-judgment interest.

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[3] Because the case has been fully briefed, Hoffinger's motion for oral argument is denied.

III. STANDARD OF REVIEW

In an action at law, the jury's verdict is conclusive as to all disputed facts and conflicting statements. *Stroud v. Arthur Andersen & Co.*, 2001 OK 76, ¶9, 37 P. 3d 783, 787; *Hames v. Anderson*, 1977 OK 191, ¶11, 571 P. 2d 831, 833. Where there is any competent evidence reasonably supporting the jury's verdict, and there is no prejudicial error shown in the trial court's jury instructions, neither the verdict nor the judgment based thereon will be distributed on appeal. *id.; Decorte v. Robinson*, 1998 OK 87, ¶¶9, 15, 969 P. 2d 358, 361-62. The decision as to where the preponderance of the evidence lies is that of the jury, which is exclusive judge of the witnesses' credibility. *Id.; Holley v. Shepard*, 1987 OK 92, ¶7, 744 P. 2d 945, 947. In analyzing the sufficiency of the evidence to sustain the judgment, the reviewing court views all evidence on the light tending to support the judgment, "together with every reasonable inference deductible therefrom, rejecting all evidence adduced by the adverse party which conflicts with it." *Barnes v. Oklahoma Farm Bureau Mut. Ins. Co.*, 2000 OK 55, ¶3, 11 P. 3d 162, 166, citing *Florafax Int'l Inc. v. GTE Mkt. Res., Inc.*, 1997 OK 7, ¶3, 933 P. 2d 282, 287.

Relevance and admissibility of evidence at trial are matters within the trial court's discretion. A reviewing court will not interfere with the trial court's determinations in the exercise of that discretion unless an abuse of discretion is shown. *Tansy v. Daacomed Corp.*, 1994 OK 146, 890 P. 2d 881; *American Nat'l Bank & Trust Co. of Sapulpa v. BIC Corp.*, 1994 OK CIV APP 70, 880 P. 2d 420.

Trial courts also have broad discretion concerning the conduct of a trial. This court will not reverse a trial court's discretionary ruling regarding whether there should be separate trials of issues or claims unless a clear abuse of discretion is shown. *Landrum v. Nat'l Union Ins. Co.*, 1996 OK 18, ¶23, 912 P. 2d 324, 328. Likewise, "[w]here the trial court exercises its discretion in passing on the question of mistrial, its decision

will not be disturbed in the absence of abuse of that discretion." *Eversole v. Oklahoma Hosp. Founders Ass'n,* 1991 OK 80, ¶23, 818 P. 2d 456, 462, citing *Jordan v. General Motors Corp.,* 1979 OK 10, ¶4, 590 P. 2d 193, 195.

Finally, issues of whether Plaintiff's state products liability claim was subject to federal law preemption, and whether there was error in the calculation of pre-judgment interest are questions of law, which are reviewed *de novo.* An appellate court has plenary, independent and non-deferential authority to re-examine a trial court's legal rulings. *Rivas v. Parkland Manor,* 2000 OK 68, ¶6, 12 P. 3d 452, 455.

IV. THE TRIAL COURT DID NOT ERR IN SUBMITTING THE ISSUE OF THE DEFECT TO THE JURY.

In Oklahoma, a party proceeding under strict product liability theory – referred to as manufacturer's product liability – must establish three elements (1) that the product was the cause of the injury; (2) that the defect existed in the product at the time it left the manufacturer, retailer or supplier's control; and, (3) that the defect made the product unreasonably dangerous. *Kirkland v. General Motors Corp.,* 1974 OK 52, ¶¶29-31, 521 P. 2d 1353, 1363. A product may be unreasonably dangerous because it is defectively designed or manufactured, or because it is not accompanied by adequate warnings regarding use of the product. *Attocknie v. Carpenter Mfg., Inc.,* 1995 OK CIV APP 54, ¶16, 901 P 2d 221, 227. "Unreasonable dangerous" means dangerous to an extent beyond that which would be contemplated by the ordinary consumer who purchases or uses it, with the ordinary knowledge common to the community as to its characteristics. *Kirkland* at ¶26, 521 P. 2d at 1362-63. See *also Restatement (Second) of Torts* § 402A, cmt. 1 (1965).

Hoffinger argues that, under this "consumer contemplation test," its pool is "immune from suit." It directs our attention to cases from other jurisdictions involving above-

ground pools, which it claims have held "that such pools cannot be defective as a matter of law."[4] Hoffinger also points out the fact that the slide was not a component of he pool when manufactured, and claims that in no diving case has a court found that the failure to inform purchasers not to put diving boards or other apparatus with these pools was a defect which made the product unreasonably dangerous. However, there are some critical differences between the facts of the cases cited by Hoffinger and those in the present matter.

First of all, both of the cited cases involve diving. We find no error in the trial court's refusal to determine – as a matter of law – that sliding is the equivalent of diving. Resolution of this question was appropriately left to the jury. Moreover, while it is true that Hoffinger did not manufacture or sell the slide, its argument overlooks evidence that consumer information it enclosed with the pool indicated that a slide was, indeed, an appropriate accessory for its pool. In fact, the materials enclosed with the pool – sealed in with the pool package provided to sellers – even discussed the property way to slide, including the head-first belly slide. This was contrary to its corporate policy, admitted throughout the proceedings, that the slide accessory did not belong with its pool. It was also in direct conflict with the testimony of its quality control manager, Danny Cargill, that Hoffinger pools, "have always been designed for wading and swimming only, nothing else." The pool materials indicated sliding was a proper use for the pool, when according to Hoffinger, it absolutely was not.

Whether the danger of using a slide to enter that particular pool would be readily apparent to the pool user was a question for jury determination. Under the facts and

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[4] Hoffinger cites *Colosimo v. May Dept. Store Co.*, 466 F. 2d 1234 (3rd Cir. 1972) (dive from platform into less than three feet of water), and *Gribler v. Doughboy Recreational*, 466 N.W. 2d 897 (Wis. 1991) (head – first dive into shallow pool, depth of which unknown to the plaintiff).

circumstances herein, particularly those related to (1) Hoffinger's failure to warn about the attachment and use of a slide, and (2) its inclusion of written materials indicating that a slide was an appropriate accessory and that head-first sliding was appropriate, we find the trial court did not err in refusing to find, as a matter of law, that the Hoffinger pool was not defective.

V. UNDER THE PARTICULAR FACTS OF THIS CASE, THE ISSUE OF DUTY TO WARN WAS FOR THE JURY TO DETERMINE

Products liability law imposes an obligation on manufacturers and sellers to transmit to communicate safety-related information when they know or should know that the buyer or user is unaware of that information. *Edwards v. Basel Pharm.,* 1997 OK 22, ¶7, 933 P. 2d 298, 300, citing *Kirkland v. General Motors Corp.,* 1974 OK 52, 521 P. 2d 1353. However, generally, a manufacturer has not duty to warn of open and obvious dangers connected with a product. See *Kelley v. Rival Mfg. Co.,* 704 F. Supp. 1039, 1045 (W.D. Okla. 1989); *Smith v. Am. Flyers, Inc.,* 1975 OK CIV APP 32, ¶18, 540 P. 2d 1212, 1216.

Where, as here, a manufacturer claims it owes no duty to warn because of the obvious nature of a danger, the trial court must, as a threshold matter, determine whether reasonable minds could differ with respect to whether the danger is open and obvious. If the trial court determines that reasonable minds cannot differ as to the obvious nature of the product-connected danger, determination of the question is a matter of law for the trial court. If, however, the trial court determines that reasonable minds could differ, the issue of the obviousness of the risk must be submitted to the jury. See *Smith v. U.S. Gypsum Co.*, 1980 OK 33, ¶¶9-16, 612 P. 2d 251, 253-54.

Plaintiff asserted that neither the risk of using the slide to enter the above-ground pool nor the risk of serious injury of

sliding in head-first position were open and obvious to him. However, as Hoffinger points out, determination of whether a risk is obvious involves an objective test, which focuses on a typical user's perception and knowledge. Hoffinger cites to a number of cases from other jurisdiction and claim that "courts elsewhere have repeatedly held no duty to warn exists as to the dangers presented by pools." However, because those cited cases involve diving, for this court to rely on them would require that we, as a matter of law, equate the act of diving into an above-ground pool with sliding. This we already have declined to do.

Hoffinger also argues that the fact Plaintiff suffered his injury in combination with another piece of equipment, which was not supplied with pool when manufactured, precludes recovery against it under a theory of duty to warn. In support of this argument, Hoffinger relies heavily on one New York case, *Denkensohn v. Davenport*, 536 N.Y.S. 2d 587 (N.Y. App. Div. 1989), which it describes as dealing specifically with a pool/slide combination. Hoffinger asserts that *Denkensohn*, the court "rejected the argument that the manufacturer of the pool had a duty to warn against uses of a slide, *because the pool manufacturer did not market the slide.*" (Emphasis by Hoffinger.) Thus, Hoffinger claims it had no duty to warn users of dangers associated with other products. These arguments are unvailing.

Hoffinger does not mention two crucial differences between the facts of the *Denkensohn* case and the present one. First, the plaintiff in *Denkensohn* climbed to the top of the slide and dove into the shallow portion of the pool immediately adjacent to the slide. Second, the *Denkensohn* court found "no evidence in the record that [the pool manufacturer] was aware that a slide was to be installed with the pool." *Id.* at 590 (emphasis added). In a subsequent case, the New York court relied on *Denkensohn* in determining that an above-ground pool manufacturer was entitled to summary judgment in an

action brought by a swimmer injured during a head-first slide. *McClusky v. Gary Pools Sales and Serv., Inc.*, 545 N.Y.S. 2d 873 (N.Y. App. Div. 1990). But in that case as well, the court found that there was not duty to warn against using the slide to enter the pool because there was no proof that the manufacturer knew a slide would be used with the pool. *Id.* at 874.

Here, there was not evidence that Hoffinger knew its authorized dealers, such as Ward, were selling pool accessories and equipment such as diving boards and slides. Even though Hoffinger was aware that the dealers selling its above-ground pools also sold slides, it failed to convey its no-slide policy to its dealers and inform them of what it deemed an improper use of its product. There was evidence that Hoffinger's area representative did advise Ward not to sell a diving board for use with Hoffinger pools but never advised Ward against selling slides for use with the pools. More importantly, the materials provided directly by Hoffinger to the consumer contemplate that slides will be installed with the pool and that head-first slides will be performed by persons using a slide to enter the pool. Under these circumstances, the issue of Hoffinger's duty to warn was appropriately left for jury determination.

VI. THE EVIDENTIARY RULINGS OF WHICH HOFFINGER COMPLAINS DO NOT CONSTITUTE REVERSIBLE ERROR.

A. Evidence of Alcohol Use.

Hoffinger's primary complaint regarding trial court evidentiary rulings is the exclusion of evidence regarding Plaintiff's use of alcohol on the night of the incident. During pre-trial depositions, Plaintiff admitted to consuming three beers from the time he arrived at the Blaker home until the accident. He denied consuming any alcohol before his arrival, and testified that he had eaten a substantial meal only an hour or so before arriving at the party. As noted above, Plaintiff had filed a pre-trail motion in limine requesting the trial court to bar

Hoffinger from introducing any alcohol-related evidence, and the trial court granted the motion. During trial, Hoffinger made an offer of proof, which included (1) excerpts from Plaintiff's deposition testimony, where he agreed "that the fact that [he was] drinking that night [had] some kind of involvement in the accident," and (2) certain medical records stating Plaintiff was intoxicated on the night in question. Hoffinger claims that the trial court's refusal to allow it to discuss Plaintiff's alcohol use or the general atmosphere at the party constitutes reversible error, particularly where Plaintiff's attorney "opened the door to those issues."

This court will accord great deference to the trial court's decisions regarding relevance of evidence and balancing its probative value and unfair prejudice because, due to first-hand exposure to the evidence and familiarity with the proceedings, the trial court has the best qualifications for balancing the value of the evidence in its proper context. *Jordan v. Cates,* 1997 OK 9, ¶20, 935 P.2d 289, 293, quoting *Young v. Rabideau*, 821 F.2d 373, 377 (7th Cir. 1987). Before any claimed error concerning admission of evidence will be deemed reversible error, the complaining party must make an affirmative showing of prejudicial error and demonstrate how the alleged error resulted in a miscarriage of justice. *Kahre v. Kahre*, 1995 OK 133, ¶45, 916 P.2d 1355, 1365; *Bond v. Bond*, 1996 OK CIV APP 3, ¶19, 916, P.2d 272, 277.

We first disagree with Hoffinger's claim that an exchange between Plaintiff's attorney and a witness[5] "opened the door" to the subject of alcohol. As for Hoffinger's offer of proof, there were other portions of Plaintiff's deposition testimony for the trial court to consider. When asked what role alcohol played in the accident, his response was: "I can't say."

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5. Plaintiff's friend testified that there were probably 20 or 25 people at the Blaker house when he and Plaintiff arrived. When asked to describe what they were doing, he replied: "Swimming, running around, having fun, I guess."

Then he was asked, "You just believe it did?" But his response to that question was: "I can't say that."

The medical records offered by Hoffinger containing a notation of intoxication were generated after Plaintiff was transferred from the first admitting hospital in Atoka to Oklahoma City, but the source of the notation was not identified. There was no indication how information might have been relayed to the personnel at the second hospital. A very real probability exists that it was based on second or third level hearsay. Certainly, there was not witness testimony identified by Hoffinger that would have shown any erratic or drunken behavior by Plaintiff at the party, and no blood alcohol tests were ordered. Plaintiff's counsel was prepared to offer testimony of emergency medical personnel who arrived at the accident scene and the physician assistant and doctors at Atoka hospital where Plaintiff was first admitted that Plaintiff was not intoxicated.

Nevertheless, Hoffinger maintains the alcohol evidence goes directly to causation and that it was entitled to argue to the jury that alcohol was the proximate cause of the Plaintiff's injury. Hoffinger cites to *Fields v. Volkswagen of Am., Inc.*, 1976 OK 106, ¶28-29, 555 P. 2d 48, 56, and claims that "drunkenness" can constitute misuse of a product.

Based on the foregoing evidence, we are unable to conclude (1) that there was any evidence of "drunkenness" or intoxication which would tend to indicate it was the proximate cause of Plaintiff's injury or create a jury question as to product misuses; or, (2) that the trial court erred in its determination that the prejudicial effect of interjecting the subject of alcohol into the trial would substantially outweigh any probative value. We find that Hoffinger has failed to demonstrate any miscarriage of justice resulting from this evidentiary ruling. For the foregoing reasons, we do not view the exclusion of evidence regarding Plaintiff's use of alcohol as reversible error.

B. Admission of Life Care Plan.

Hoffinger assert that the trial court committed

reversible error by allowing admission of a "Life Care Plan" from one of the Plaintiff's experts because (1) it was hearsay – an out-of-court document offered to prove the amount of Plaintiff's future life care and medical expenses; and (2) it was not specifically listed as an exhibit on the pre-trial order. Hoffinger claims it was harmfully surprised and unfairly prejudiced by the admission of the report, which contained a cost estimate of several million dollars for Plaintiff's future medical expenses and life care needs.

The "Life Care Plan" was prepared by Plaintiff's vocational rehabilitation expert, and Plaintiff asserts it merely constituted a summary of the voluminous research conducted by the expert into Plaintiff's needs as quadriplegic. Plaintiff also points out that this expert was identified and listed as a witness in the pre-trial order, but Hoffinger never asked to take his deposition and never listed its own vocational rehabilitation expert. We find no reversible error in this regard, and note that Hoffinger makes no claim that the amount of damages awarded to Plaintiff was excessive.

C. Admission of Sample Writing.

The next evidentiary complaint is that the trial court erred in admitting what Hoffinger refers to as "an official looking document, " – a sample warning, drafted by the National Spa and Pool Institute (NSPI), regarding use of slides with pools – which Hoffinger claims created a false impression that the warning was in use at the time the subject pool was sold. We have examined the "no sliding" warning and note that it contains no references to the NSPI, or any other similar organization. We also note that the trial court admitted the exhibit merely to show the feasibility of the warning, not to show that it was in existence or required by any regulatory body at the time the pool was sold. Again, we find no reversible error.

D. Evidence Regarding Information Communicated to Retailers.

At the hearing before trial, Hoffinger sought to exclude all evidence of communication between itself and its distributors or retailers. The trial court denied the motion, and overruled Hoffinger's continued objections to such evidence at trial. Hoffinger claims these rulings were error and constitute grounds of a new trial, because manufacturers do not have any duty under Oklahoma law to warn retailers. According to Hoffinger, the evidence was irrelevant and overly prejudicial, creating an impression that Hoffinger breached a duty (in particular to Ward) that t did not owe.

Our simple response to this allegation of error is to refer Hoffinger back to our discussion of *Denkensohn,* above, and state that, where Hoffinger knew its retailers sold consumers slides to accompany Hoffinger pools, such evidence certainly was relevant to the issue of whether the pool, as placed in the stream of commerce, contained adequate instructions/warning regarding proper use. *Attocknie v. Carpenter Mfg., Inc.,* 1995 OK CIV APP 54 at ¶16, 901 P. 2d at 227.

VII. THERE WAS NO ABUSE OF DISCRETION BY THE TRIAL COURT IN DENYING THE ALTERNATIVE MOTIONS FOR SEVERANCE AND MISTRIAL, OR IN FAILING TO INFORM THE JURY OF THE TERMS OF THE PRE-TRIAL HIGH/LOW AGREEMENTBETWEEN PLAINTIFF, WARD AND SOUTH CENTRAL.

The record reveals that, sometime before trial, the parties to the lawsuit agreed to mediation. Apparently, the mediation resulted in a "high/low" agreement between Plaintiff, Ward and South Central, the precise terms of which are not in the record.[6]

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6. Apparently, there were some difficulties in communicating with the mediator. The agreement may have been disclosed by the mediator to the trial court on the day before the trial started, but Hoffinger would later claim that, at that time, it had suspicions, but no specific knowledge, that such an

Articulating concern about what it perceived to be a recent "lack of dispute on a number of issues" between Plaintiff and the two distributors, Hoffinger had moved for severance on the day before trial, during hearing of preliminary motions. Hoffinger's counsel requested the trial court to inquire as to whether or not there had been some settlement or some type of high/low agreement reached by certain of the parties. He also expressed concern to the trial court about the "sanctity of the proceeding" because "the other defendants don't have real exposure and they keep pointing the finger at us." Hoffinger requested the trial court to continue the matter, or serve Plaintiff's claims against it from the claims against Ward and South Central. However, the trial court denied the motion for severance, stating its opinion that Ward and South Central were "before the court to represent their clients and protect their clients' interests."

Then, a couple of days into trial, Plaintiff settled with the pool and slide distributors for a sum certain, and the settling parties announced this to the court, out of hearing of the jury, when Plaintiff had concluded the liability portion of his case. According to South Central, its decision to settle for a sum certain came when Hoffinger was able to elicit some damaging testimony from Plaintiff's expert witness regarding culpability of South Central. Ward's counsel expressed concerns about his client's "technical liability," inasmuch as Cargill, Hoffinger's quality control manager, basically had admitted on the stand that Hoffinger sold a defective product. Plaintiff's counsel stated his impetus in deciding to settle with the distributors was a concern about the popularity of the Ward family and "having Kelly Ward as a defendant in a Pittsburg County jury [trial]."

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agreement had been reached. During the trial, the court received and reviewed the agreement,, but later determined it should remain confidential.

He also stated that, because they all were in agreement that Hoffinger should have communicated its position about slides, he was trying to avoid Ward and South Central's cross-examination of his experts on the issue of Plaintiff's damages.

The trial court determined it would disclose the fact of settlement to the jury and instruct the jury on the issue,[7] but precluded Hoffinger from making any mention of the prior high/low agreement. Hoffinger claims that the trial court erred in denying its motion to sever, and that a new trial should be granted.

The provisions of 12 O.S.1991 § 2018(D) give the trial court discretion to require separate trials of any claim or issue. However, as noted by the court in *A-Plus Janitorial & Carpet Cleaning v. Employers' Workers' Compensation Association,* 1997 OK 37, ¶24, 936 P.2d 916, 928 (footnote omitted), trial courts generally order separate trials "only when *clearly necessary.*" The party moving for a separate trial has the burden to show prejudice. *Id.* Hoffinger relies on *Cox v. Kelsey-Hayes Co.*, 1978 OK 148, 594 P.2d 354, for the proposition that failure to admit evidence of the high/low agreement to show bias of the settling defendants caused it to suffer unfair prejudice and warrants a new trial. However, we find this reliance on *Cox* to be misplaced.

Cox involved a "Mary Carter" agreement between a plaintiff and one of multiple defendants. This type of agreement generally includes (1) secrecy, (2) a provision that the contracting defendant remain in the lawsuit, (3) a guarantee from the contracting defendant that the plaintiff will realize a certain monetary recovery, and (4) a formula that provides that defendant's liability will decrease in direct proportion to the increase in the non-agreeing defendant's liability. *Id.* at ¶11,

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[7] The trial court instructed the jurors that the fact that Ward and South Central were no longer present in the lawsuit should not affect their deliberations and that the fact of settlement, if any, should not be considered by them in any manner.

594 P.2d at 357. This last element, unique to "Mary Carter" type agreements, was described in *Cox* as creating "the most unfair prejudice to the non-agreeing defendant and his right to a fair trial." *Id.* at ¶12, 594 P.2d at 357. According to the court, this is because:

> Plaintiff is guaranteed a certain amount from one defendant regardless of the outcome of the verdict. In return that defendant receives the right to benefit from and joint verdict, or a verdict solely against the non-agreeing defendants. The agreeing defendant therefore partakes of direct interest in the outcome of the litigation.The normal adversary relationship between plaintiff and defendant becomes distorted, if not destroyed.

Id. at ¶12, 594 P.2d at 357-58 (emphasis added).

The court in *Cox* provided instructions for trial courts in dealing with agreements whereby one defendant will directly benefit from a joint award:

> If the agreement does not absolutely settle the conflict, but rather hinges on the amount of the verdict, the trial court should review the circumstances of the agreement and either *hold that portion of the agreement granting agreeing defendant an interest in a large plaintiff's verdict unenforceable as against public policy, or dismiss the agreeing defendant from the suit.* In no circumstances should a defendant who will profit from a large plaintiff's verdict be allowed to remain in the suit as an ostensible defendant. If agreeing defendant is dismissed, cross-examination affecting his interest and credibility should protect the interest of non-agreeing defendant. If agreeing defendant remains in the suit and the agreement has been declared void as against public policy, then the

> adversary nature of the proceedings has been preserved and the agreement is no longer relevant.

Id. at ¶31, 594 P.2d at 360. However, the court did conclude that "any pre-trial agreement between Plaintiff and a defendant must be revealed to all parties and the court prior to trial and to the jury in some appropriate degree to be decided by the trial court." *Id.* at ¶33, 594 P.2d at 360 (footnote omitted).

Hoffinger characterizes the pre-trial high/low agreement between Plaintiff and the other two defendants as a "Mary Carter-type agreement." However, in *Hoops v. Watermelon City Trucking, Inc.*, 846 F.2d 637 (10th Cir. 1988), the federal court considered the applicability of reasoning in *Cox* to a high/low agreement and concluded that such an agreement "was not proscribed by *Cox*. *Id.* at 640 (footnote omitted). This was because the "essential element" of the typical Mary Carter agreement condemned in *Cox* was missing – the agreeing defendant neither had an interest in the plaintiff's verdict against the other defendant, nor stood to benefit from a larger verdict against that defendant. *Id.* Addressing the non-agreeing defendant's argument that the "agreement changed the adversarial nature of the proceedings, aligning the [agreeing defendant] with the plaintiff," the court in *Hoops* stated:

> To the extent that [the agreeing parties] exhibited a shared interest in proving [the non-agreeing defendant] liable for the accident, we find that conclusion unremarkable and attributable more to the circumstances
> of the accident and the framing of the litigation than to the settlement agreement." *Id.* at 64n.5.

The non-agreeing defendant in *Hoops* also complained that the existence of the high/low agreement was not revealed until the morning of trial. The appellate court did state that the timing of the disclosure "could have been more convenient,"

but found no violation of *Cox* or prejudice to that defendant, and noted that, "importantly, [the defendant] had the opportunity to cross-examine [the plaintiff] concerning the agreement and to argue the effect of the agreement to the jury." *Id.* at 641.[8] Hoffinger seizes this comment by the court in *Hoops*, and maintains that denial of access to the terms of the pre-trial high/low agreement and the ability to cross-examine witnesses (like Kelly Ward) regarding the agreement to show his bias, require a finding that *Cox* was violated and the grant of a new trial. Therefore, we must determine whether, under the particular circumstances of this case, the technical violation of the disclosure requirement of *Cox* mandates a finding of trial court error and a consequent reversal.

As we noted above, Hoffinger was aware, at the hearing on pre-trial motions, of the possibility that a high/low agreement had resulted from the mediation. As for the apparent alignment of Ward and South Central against Hoffinger, it certainly is not uncommon for one defendant to attempt to lay blame on another defendant. Until about two weeks prior to trial, Hoffinger took a position adversarial to Ward, by claiming that Ward never should have sold a slide to go with its pool.[9] This caused Ward to defend by attempting to place fault at the feet of Hoffinger for failing to inform it of the policy restricting the sale of a slide as an accessory for the pool.

After carefully reviewing the record, we do not find the

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[8] The court in *Hoops* noted that, although the defendant was not given the text of the agreement until the end of the first trial day, the substance of the agreement was revealed prior to trial.

[9] Trial began June 1, 2000. Statements made by Ward's counsel during a bench conference reveal that Hoffinger's original posture did not change until may 19, when Mr. Hoffinger faxed a letter directly to Kelly Ward stating that they needed to work together to defeat Plaintiff's claim.

other parties' actions to be of the sinister proportions as portrayed by Hoffinger. We are unable to conclude that the trial court was incorrect in its determination that counsel for Ward and South Central had assumed a legitimate defense posture for their clients.

The extent of jury disclosure of settlement agreements is discretionary with the trial court. *See Cleere v. United Parcel Serv., Inc.*, 1983 OK CIV APP 29, ¶12, 669 P.2d 785, 789-90. We also are unable to conclude that trial court abused its discretion in this regard or in ruling on the motion for mistrial. like the court in *Hoops*, we are not convinced that the alignment of the parties was directly attributable to the high/low agreement rather than to the circumstances of the case and framing of the litigation. *Hoops*, 846 F.2d at 640 n.5. In this case, as in *Hoops*, it was the framing of the litigation that aligned Ward against Hoffinger.

VIII. FEDERAL LAW DOES NOT PREEMPT PLAINTIFF'S CLAIMS.

Hoffinger claims that the trial court erred in failing to grant its motion for summary judgment on the issue of federal law preemption. It demurred to Plaintiff's evidence on this same ground. According to Hoffinger, the Consumer Product Safety Act (CPSA), 16 CFR 1207 (1978), entitled "Safety Standard Swimming Pool Slides," places the entire burden for warning slide users of dangers attendant with that product (whether connected to an above-ground or below-ground pool) on the slide manufacturers and preempts Plaintiff's common law tort action. Hoffinger maintains that no federal standard directs that any signs warning of the use of slides be placed on the pool. It further maintains that the effect of upholding the judgment in this tort action would be to impose a requirement for additional signage that "would **directly conflict** with the federally mandated signs regarding a swimming pool/slide combination and, in fact, would weaken the impact of those warnings." However, we find that the provisions of the CPSA

do not preempt Plaintiff's products liability claim in this case.

> The intended purpose of the federal safety standard is:
>
> > [T]o reduce the unreasonable risk of injury associated with swimming pool slides by establishing requirements for materials, strength and performance of the slide and its components, by instructions and warnings to be attached to the slide showing proper techniques for use of the slide and to be provided to the user-installer, and by recommending minimum water depths depending on the height of the slide and age of the user. 41 Fed. Reg. 2742 (Jan. 19, 1976). (Emphasis added.)

As noted by the court in *Attocknie v. Carpenter Mfg., Inc.*, 1995 OK CIV APP 54, 901 P.2d 221:

> The doctrine of preemption arises from the Supremacy Clause of the United Stated Constitution, U.S.Const. Art. VI, cl.2, and invalidates any state law that contradicts or interferes with an Act of Congress .... It is well recognized that "state law" as used in preemption analysis, includes not only the positive enactments of a state but also common law rules of liability as determined by state judicial decisions.

Id. at ¶8, 901 P.2d at 224 (citations and footnote omitted). Preemption occurs under four instances: (1) express statutory language; (2) a pervasive regulatory scheme that inters by its presence that Congress felt the federal regulation did not need supplemental state law provisions; (3) an actual conflict between state and federal laws making it physically impossible to comply with both; or (4) where the objectives and purposes of Congress are thwarted by state law. *Todd v. Frank's Tong*

Serv., Inc., 1989 OK 121, ¶5, 784 P.2d 47, 49. A preemption may arise "only where there is a 'conspicuous federal intent to exclude the questioned state law,'" *Attocknie* at ¶8, 901 P.2d at 224, quoting *Todd* at ¶5, 784 P.2d at 49, and, generally, there is no presumption favoring preemption. *Colon ex rel. Molina v. BIC USA, Inc.*, 136 F. Supp.2d 196 (S.D.N.Y. 2000).

Plaintiff's common law claim is not expressly preempted by the federal standard. *Colon* at 205. But this does not foreclose an implied preemption analysis. *Choate v. Champion Home Builders Co.*, 222 F.3d 788, 794 (10th Cir. 2000). Hoffinger argues that we should find implied conflict preemption here – that to impose liability on pool manufacturers for failure to provide warnings about sliding would pose a significant obstacle to CPSA objectives and weaken the impact of the federally required warnings. In support of this argument, Hoffinger cites to the Consumer Product Safety Commission's (CPSC) consideration of public comment to the CPSA and claims that the CPSC specifically has determined that a requirement for placement of any additional warning signs (such as on a pool), other than those specified in the CPSA for placement on slides, could dilute or reduce the effectiveness of the signs on the slides. However, we find that the statement Hoffinger attributes to the CPSC has been taken out of context.

Section 1207.7 of the CPSC "Safety Standard," 41 Fed. Reg. 2742 (Jan. 19, 1976), provides for "intended-use instructions" and certain warning signs (slide ladder tread and transom signs) to be included with a packaged pool slide. Subsection 1207.7(g) provides that the intended-use instructions, including eleven safety rules, be printed or attached so that they cannot become separated from the main

installation instruction sheet.[10] The comment that the CPSC was addressing was a suggestion that the entire "intended-use instructions" prominently be displayed in the pool or slide area. The CPSC did not adopt the suggestion because:

> The Commission has required the permanent attachment on slides of signs conveying the information deemed to be most important in preventing injuries occurring in the use of slides. The considerable information contained in the intended-use instructions that is not presently required to be attached to the slide would have to be provided on a separate sign to be displayed elsewhere, according to this suggestion. This separate sign could tend to dilute or reduce the effectiveness of the signs on the slides. 41 Fed. Reg. 2742, 2746 (Jan. 19, 1976).

From this clear language, we conclude that attachment of a "no sliding" sign on the Hoffinger pool would not have conflicted with or detracted from the stated federal objectives.

Hoffinger's preemption argument misses the point in one other significant regard. The gravamen of Plaintiff's product liability claim was not that Hoffinger should have warned about proper sliding techniques, it was that Hoffinger failed to provide a warning against installation of any slide with its pool.

Clearly, Plaintiff's product liability claim neither conflicts with the federal requirements nor detracts from the objectives of the federal regulatory scheme. Because Plaintiff's claim does not "stand as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress,"

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[10] The instructions set forth eleven safety rules including, for example: "1. Only one person allowed on the slide at any time," and "2. Roughhousing or horseplay on the slide is strictly forbidden."

Choate at 796, it is not impliedly preempted by the CPSA.

IX. THE TRIAL COURT DID NOT ERR IN ITS CALCULATION OF PRE-JUDGMENT INTEREST.

When the trial court was calculating the amount of pre-judgment interest, it first subtracted the $100,000.00 pre-litigation settlement amount paid by the homeowners from the $2 million verdict. The trial court then calculated interest, pursuant to the statutory formula set forth in 12 O.S. Supp. 2000 § 727, on the sum of $1.9 million. The trial court added interest in the amount of $827,046.92 to the $2 million verdict, for a total of $2,827,046.92. From this sum, the trial court deducted the total of the settlement amounts ($550,000.00) and entered judgment against Hoffinger in the amount of $2,277,046.92. Hoffinger complains that the trial court did not subtract the settlement amounts paid by Ward and South Central ($450,000.00) from the verdict before performing the pre-judgment interest calculation. Without explaining why, Hoffinger claims that this was error. Hoffinger merely directs our attention to *Landrum v. National Union Fire Insurance Co.*, 1996 OK 18, 912 P.2d 324, and *Baker v. Barnes*, 1997 OK CIV APP 77, 949 P.2d 695, which relies on *Landrum*.

We have reviewed these two cases, and they indicate that it was entirely appropriate for the trial court to calculate pre-judgment interest without first deducting the amount of the Ward and South Central settlements. Plaintiff received no pre-litigation benefit from these settlement proceeds and suffered a loss of use of the monies. *Landrum* at ¶21, 912 P.2d at 329; *Baker* at ¶¶6-7, 949 P.2d at 696-97. Therefore, we find this allegation of error to be without merit.

X. CONCLUSION

We find none of Hoffinger's allegations of error availing of reversal. There is competent evidence in the record to support the jury verdict against Hoffinger. Accordingly, the

judgment entered in favor of Plaintiff is AFFIRMED.

TAYLOR, J., concurs, and RAPP, J., dissents.

RAPP, J., dissenting:

I dissent. My review of the record here leads me to conclude that there is no manufacturer's liability in the design or construction of the pool or, for that matter, the use of a slide in conjunction with the pool. The accident occurred and resulted from Plaintiff ignoring the open and obvious dangerous condition of the pool caused by the shallowness of the water and the existent obvious danger of the pool in this condition.

In addition, I am of the opinion that the existence of the high/low agreement of the other defendants served to destroy the manufacturer's ability to achieve a fair trial. This agreement between the other defendants, known to the trial court, created and allowed the existence of sham defendants before the court and destroyed the very crucible of trial designed to achieve the truth. I feel this defendant was prejudiced and would reverse and remand for a new trial.

February 12, 2002

IN THE SUPREME COURT OF THE STATE OF OKLAHOMA

FILED
SUPREME COURT
STATE OF OKLAHOMA
Tuesday July 2, 2002

THE CLERK IS DIRECTED TO ENTER THE FOLLOWING ORDERS OF THE COURT:

95,304 Kenny Coyle v. Doughboy Recreational Division of Hoffinger, Inc., Hoffinger Industries
Petition for certiorari is denied.
CONCUR: Watt, V.C.J., Lavender, Opala, Kauger, Boudreau, JJ.
DISSENT: Hargrave, C.J., Hodges, Summers, Winchester, JJ.

96,148 Vickie L. DeSilvey v. Jared A. DeSilvey.
Petition for certiorari is denied.
CONCUR: Hargrave, C.J., Watt, V.C.J., Hodges, Lavender, Kauger, Summers, Boudreau, Winchester, JJ.
DISSENT: Opala, Jr.

96,173 Virtual Electric, Inc. v. Richard Liggins.
Petition for certiorari is dismissed as untimely.
CONCUR: Hargrave, C.J., Watt, V.C.J., Lavender, Opala, Kauger, Boudreau, Winchester, JJ.
Summers, J. with whom Hodges, J. joins, dissenting.
I would deny the petition for certiorari.

96,202 Best Environmental Technologies and Services, Inc. v. State of Oklahoma, Earl E. Henry, Jr., Denny Hight, Donal Ruminer, individually and

in their respective capacities as Administrator and Employees of the Oklahoma Petroleum Storage Tank Release Indemnity Program and the Oklahoma Tank Release Environmental Cleanup Indemnity Fund.

Petition for certiorari is denied.

CONCUR: Hargrave, C.J., Watt, V.C.J., Hodges, Lavender, Kauger, Summers, Boudreau, Winchester, JJ.

DISSENT: Opala, J.

96,344 Charlotte Nichols, Personal Representative of the Estate of Josie Emma Davis, Deceased v. Amity Care Corporation d/b/a Grace Living Center(s), trade name for Amity Care Corporation.

Petition for certiorari is denied.

CONCUR: Watt, V.C.J., Hodges, Lavender, Summers, Boudreau, Winchester, JJ.

DISSENT: Hargrave, C.J., Opala, Kauger, JJ.

96,367 Michael Wayne Risner v. Dayton J. Poppell, Warden, et al.

Petition for certiorari is denied.

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/s_____
VICE CHIEF JUSTICE

IN THE COURT OF CIVIL APPEALS
STATE OF OKLAHOMA
DIVISION IV

FILED
COURT OF CIVIL APPEALS
STATE OF OKLAHOMA
APRIL 30, 2002

JAMES W. PATTERSON

CLERK

THE CLERK IS DIRECTED TO NOTIFY ALL PARTIES OF THE FOLLOWING ORDER(S):

95,304 KENNY COYLE, Plaintiff/Appellee, vs. DOUGHBOY RECREATIONAL DIVISION OF HOFFINGER INDUSTRIES, Defendant/Appellant.

Appellant's Petition for Rehearing is DENIED.

DONE IN CONFERENCE this 26th day of April, 2002.

/s_____
JOE C. TAYLOR
Presiding Judge
Division IV

TITLE 16--COMMERCIAL PRACTICES CHAPTER II--CONSUMER PRODUCT SAFETY COMMISSION PART 1207--SAFETY STANDARD FOR SWIMMING POOL SLIDES—

Scope, purpose, and findings.

(a) Scope and purpose. This part 1207 sets forth the consumer product safety standard issued by the Consumer Product Safety Commission for the manufacture and construction of slides for use in swimming pools. The requirements of this standard are designed to reduce or eliminate the unreasonable risks of death or injury associated with swimming pool slides. This standard also makes certain recommendations regarding the installation, maintenance, and intended use of swimming pool slides that supplement its mandatory requirements. This standard is applicable to all swimming pool slides manufactured after July 17, 1976. Paragraph (b) of this section sets forth the findings which the Commission is required to make by section 9(c) of the Consumer Product Safety Act (15 U.S.C. 2058(c)).

(b) Findings. (1) The Commission finds that unreasonable risks of death or injury from accidents are associated with swimming pool slides. These risks are (i) quadriplegia and paraplegia resulting from users (primarily adults using the swimming pool slide for the first time) sliding down the slide in a head first position and striking the bottom of the pool, (ii) leg fractures resulting from feet first entry, (iii) impact of sliders with other people in the pool, and (iv) falls from the slide ladder.

(2) The Commission's findings apply to the swimming pool slide standard that it published on January 19, 1976 (42 FR 2751). On March 3, 1978 the U.S. Court of Appeals for the Fifth Circuit set aside portions of that standard (Aqua Slide `N' Drive Corporation v. CPSC, 569 F.2d 831 (5th Cir. 1978)). On December 18, 1978, the Commission published revisions to the standard which reflect the court's decision. However, the findings have not been revised and they are therefore not fully applicable to the revised swimming pool slide requirements.

For example, the revised standard does not address the risk of quadriplegia and paraplegia (except insofar as the standard specifies a low angle of attack of the slider into the water) because the court set aside the provisions concerning installation instructions and warning signs.

(2) The Commission finds that the types or classes of products that are subject to this standard are those swimming pool slides manufactured, constructed, or imported for use in connection with all swimming pools, whether in-ground, on-ground, or above-ground, regardless of the materials of manufacture or structural characteristics of the slides. It is estimated that 350,000 of these slides are currently in service and that each year the number of slides in use may increase by 5 to 10 percent.

(3) The Commission finds that the public uses swimming pool slides in recreation at both public and private swimming pools, and it is estimated that 75% of these slides are located at residential pools. It is anticipated that public demand for the products will decline slightly for a time following issuance of this standard as a result of consumer awareness of hazards associated with the product caused by the mandatory signs placed on the slides and as a result of recommendations regarding the installation and intended use of the products. The decline in demand is expected to be short-term. It is anticipated that the utility of the slides as a recreational device will be increased to the extent that injury or death associated with the use of the product is eliminated or reduced.

(4) The Commission also finds that manufacturing cost increases as a direct result of this standard and promotional cost increases as an indirect result of this standard are expected to be modest for the industry as a whole. Any resulting increase in the cost of slides to consumers attributable directly or indirectly to the requirements of this standard will be small. No adverse effect on the availability of the product to consumers is expected.

(5) The Commission has considered other means of achieving the objective of the standard, but has found none that would have fewer adverse effects on competition or that would cause less disruption or dislocation of manufacturing and other commercial practices, consistent with the public health and safety.

(6) The Commission also finds that this standard, including its effective date, is reasonably necessary to eliminate or reduce the unreasonable risks of injury associated with swimming pool slides and that promulgation of the standard is in the public interest.

1207.2 Effective date. This part 1207 shall become effective July 17, 1976. All swimming pool slides manufactured after that date must meet the requirements of this part 1207. [41 FR 23187, June 9, 1976].

Sec. 1207.3 Definitions. (a) As used in this part 1207: (1) Aboveground pool slide ladder means a slide ladder that is not anchored in the ground or support deck and that can be removed from the slide or hinged and locked so that unauthorized or unsupervised use of the slide is prevented. (2) Abrasion hazard means a sharp or rough surface of a swimming pool slide that would scrape the skin upon casual contact. (3) Assembled product means all parts, components, and fasteners as defined in and assembled according to the manufacturer's assembly and installation instructions. [[Page 269]] (4) Bracing means members providing structural support to the assembled, installed slide. (5) Casual contact means contact of any body part with the slide occurring by chance or nonchalant encounters. (6) Center of gravity means the point that represents the mean position of the concentrated mass of a body. (7) Curved slide means a slide whose runway curves out of the vertical plane at any point along the slide path. (8) Cutting hazard means a slide surface that would cut the skin under casual contact. (9) Designated waterline means the horizontal line through whichever of the following is

applicable: (i) The midpoint of the operating range of the skimmers, or (ii) on pools with overflow systems, the height of the overflow rim. (10) Edge guards means shields designed to cover sharp edges on slides. (11) [Reserved] (12) Freestanding slide means a slide designed for aboveground pools that is not fastened to the pool deck or the ground. This slide may have attachments to the aboveground pool to prevent misalignment. (13) Friction means the force tending to reduce the velocity of the slider on the slide. (14) [Reserved] (15) Intended use means behavior on swimming pool slides as disclosed by the manufacturer, as specified in this part 1207, or to which the slide may be subjected by a reasonable user (including reasonably foreseeable misuse). (16) Ladder angle means the angle of the ladder measured from a plumbline. (17) Ladder platform means a platform built into the slide ladder. (18) Operational strength means the strength of the slide and/or its components after installation according to the manufacturer's instructions. (19) Performance test means a test to measure the functional or structural characteristics of the slide and may include: (i) Observations and measurements of the slide's functioning in the ``intended use'' mode, installed according to the manufacturer's installation instructions, and/or (ii) Observations and measurements of the slide's response to dynamic and static loads. (20) [Reserved] (21) Pinching hazard means any configuration of slide components that would pinch or entrap the fingers or toes of a child or an adult. (22) Puncture hazard means any slide surface or protrusion that would puncture a child's skin under casual contact. (23) Runway means the surface on which the user slides in the intended use of a slide. (24) Runway rail means a raised edge or guard that keeps the slider on the runway. (25) Runway length means the length of the runway measured along its centerline. (26) Slide width means the width of the slide runway measured between the inside of the left and right runway rails. (27) Straight slide means a slide whose runway curves only in the vertical plane.

(28) Swimming pool slide means any device used to enter a swimming pool by sliding down an inclined plane. (29) Tamperproof means that tools are required to alter or remove portions of the slide such as guards, treads, etc. (30) Trajectory means the path of a slider's center of gravity from start to finish. (31) [Reserved] (32) Tread contact surface means foot contact surfaces of ladder, step, stair, or ramp. [41 FR 2751, Jan. 19, 1976, as amended at 43 FR 58813, Dec. 18, 1978]

Sec. 1207.**4** Recommended standards for materials of manufacture. (a) General. The materials used in swimming pool slides should be compatible with man and compatible with the environment in which they are installed. These materials should be capable of fulfilling the design requirements prescribed by Sec. 1207.5. (b) Effects of environment. The choice of materials for swimming pool slides should be such that the operational strength of the entire slide assembly, as defined by the performance tests in [[Page 270]] Sec. 1207.5, should not be adversely affected by exposure to rain, snow, ice, sunlight, local, normal temperature extremes, local normal wind variations, expected local air pollution products, and the mechanical, electrical, and chemical environment in and around swimming pools. For purposes of this part 1207, ``local normal'' temperature extremes and wind variations are defined as the average annual record limits for the past 10 years at any slide installation point in the U.S.A. where such statistical information exists (see reference (a) in Sec. 1207.11) (c) Materials selection. The selection of all materials for swimming pool slides should be such that all surfaces and edges that may come in contact with the user are assembled, arranged, and/or finished (deburred, polished, etc.) so that they will not constitute a cutting, pinching, puncturing, or abrasion hazard under casual contact and intended use by children or adults. (d) Toxicity. The selection of materials used in swimming pool slides should be such that the assembled and installed products

should not be toxic to man or harmful to the environment under intended use and reasonably foreseeable abuse or disposal. All paints and finishes used on swimming pool slides shall comply with 16 CFR 1303.2(b)(2) and 1303.4(a). (e) Chemical compatibility. The selection of materials for swimming pool slides should be such that the assembled and installed product, and the parts, are chemically compatible with the materials and environment contacted under intended use and reasonably foreseeable abuse.

41 Fed. Reg. 2742

ESTABLISHMENT OF STANDARD

The purpose of this document is to issue a consumer product safety standard for swimming pool slides (16CFR Part 1207), effective July 19, 1976. The standard is intended to reduce the unreasonable risk of injury associated with the swimming pool slides by establishing requirements for materials, strength, and performance of the slide and its components, by instructions and warnings to be attached to the slide showing proper techniques for the use of the slide and to be provided to the user-installer, and by recommended water depths depending on the height of the slide and age of the user.

41 Fed. Reg. 2744

E. Water Depth.

1. One comment suggests that warning signs will be ineffective in reducing the unreasonable risk if injury associated with pool slides and that the depth of water should be sufficiently right, so that injuries caused by striking the bottom cannot occur. This approach has been considered by the commission, and is rejected because of the increased drowning potential involved in specifying greater water depths. Because of the trade-offs involved, the method adopted to achieve a reasonable degree of safety is to slightly increase the depth of the water to a degree sufficient to provide some additional depth protection, and to augment this improvement through the use of warning signs and by requiring the slide to impart low angles of attack of the slider into the water. These mechanisms together represent what the commission believes to be the most satisfactory approach to reducing the unreasonable risk of injury associated with swimming pool slides.

42 Fed. Reg. 2745

8. Another comment suggests that the standard complex rules on water depths should be replaced with a single simple rule that no slide should be placed in water shallower than a given minimum depth. The offeror and the commission, in their assessment of the problem, also considered such an alternative, and the commission believes that the depths recommended in the standard with appropriate warning and instruction signs will substantially reduce the unreasonable risk of injury. However, a single depth would require that most slides be placed in relatively deep water, thereby increasing the potential hazard of drowning to small children. The commission believes that this risk of drowning must be considered and, therefore, the standard to contain provisions intended to minimize the risk that is created when placement of slide in deeper water is required. Allowing several depth criteria, depending upon slide height and use, provides closer control of the conflicting dangers that the standard attempts to balance. Accordingly, the suggestion is rejected.

42 Fed. Reg. 2746

7. Another comment suggests that the instructions for the intended use of slides should be permanently displayed in the slide or pool area.

The commission has required that the permanent attachment on the slides of signs conveying the information deemed to be most important in preventing injuries occurring in the use of slides. The considerable information contained in the intended-use instructions that is not presently required to be

attached to the slide would have to be provided on a separate sign to be displayed elsewhere, according to this suggestion. This separate sign could tend to dilute or reduce the effectiveness of the signs on the slides. Accordingly, the suggestion has not been adopted.

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In The

Supreme Court of the United States

DOUGHBOY RECREATIONAL DIVISION OF HOFFINGER INC., AND HOFFINGER INDUSTRIES,

Petitioners,

v.

KENNY COYLE,

Respondent.

On Petition For A Writ Of Certiorari To The Supreme Court Of The State Of Oklahoma

RESPONDENT'S BRIEF IN OPPOSITION

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REASONS FOR DENYING THE WRIT

Kenny Coyle was injured sliding into an above-ground pool manufactured by Petitioner Doughboy Recreational Div. of Hoffinger Inc. and Hoffinger Industries ("Hoffinger"), which has maintained for years that slides should *never* be used with its pools, but did *nothing* to warn dealers, installers, owners and users not to install or use slides.[1] On the contrary, Hoffinger included use and care of slides in literature accompanying its pools. Mr. Coyle alleged the pool was defective because it had no warning that slides were not to be attached. The case was tried to a jury under the Oklahoma law of manufacturers' products liability as adopted in *Kirkland v. General Motors Corp.*, 1974 OK 52, 521 P.2d 1353. The jury awarded Mr. Coyle $2 million and he has collected the judgment and interest from a bond posted by Hoffinger during the Oklahoma appeal process.

Hoffinger makes only above-ground pools and does not manufacture slides. There are no regulations of the Consumer Product Safety Commission ("CPSC") regarding *pools*. CPSC regulates only swimming pool *slides*. Although the CPSC decided not to prohibit the use of slides with above-ground pools, Hoffinger was free to attach such a prohibition to its product and should have done so under its common-law duties. If a warning had been given by Hoffinger, there simply would not have been a slide attached to the pool.

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[1] It knew its dealers sold slides with its pools. Petition, p. 12A contains a typographical error in the Court of Civil Appeals opinion where it says "there was *not* evidence that Hoffinger knew . . . ".

Evidence that Mr. Coyle had consumed 3.2 percent beer was not admitted at trial. Contrary to Hoffinger's argument (Petition, pp. 5-6), all defendants, including Hoffinger, admitted there were no witnesses to testify he was impaired. The defendants other than Hoffinger did not oppose Mr. Coyle's motion in limine on the issue because they felt it would have been reversible error to admit such inflammatory evidence.

Before trial, Hoffinger learned Mr. Coyle and the other two defendants (the pool/slide dealer and the slide distributor) had entered into a "high-low" agreement. The trial court found it was an acceptable agreement that would require the dealer and distributor to "represent their clients zealously". Contrary to Hoffinger's assertions, the high-low agreement did not change the positions the other defendants had been taking consistently in the lawsuit; as distributors/retailers, their position had been that the pool and slide manufacturers were responsible for the design and warning defects and blamed Hoffinger for not telling them about the danger of placing a slide on its above-ground pool. A Hoffinger quality control manager had basically admitted at trial that the pool was defective. In addition, Hoffinger had taken an adversarial position toward the dealer, claiming the dealer should not have sold the slide to the pool owner. When the other defendants actually settled during trial, the jury was informed of the fact, but not the amount, of the settlement.

ARGUMENT & AUTHORITY

I. THE HIGH-LOW AGREEMENT WAS PROPER

Because of the high-low agreement of Coyle with the slide distributor and the pool dealer, those defendants proceeded to trial with the risk they would have to pay the high amount if Mr. Coyle obtained a substantial verdict. It was therefore to their advantage to keep damages low. The Oklahoma Supreme Court has prohibited "Mary Carter" agreements in which a defendant conditionally settles, remains in the lawsuit and whose liability is decreased in direct proportion to the increase in the non-agreeing defendants' liability. *Cox v. Kelsey-Hayes Co.*, 1978 OK 138, 594 P.2d 354. The agreement here was not a Mary Carter agreement because the dealer and distributor were not to benefit at the expense of Hoffinger. The agreement and the fact it was not revealed to the jury did not affect Petitioner's rights of due process.

II. FEDERAL PREEMPTION IS NOT AN ISSUE WHEN A SLIDE SHOULD NOT HAVE BEEN INSTALLED WITH ANY HOFFINGER POOL

Hoffinger admits there are no federal requirements for labeling swimming pools. There can be no express preemption of products liability law regarding pools. There is also no implied preemption because there can be no conflict between federal regulations of slides and warnings on pools that prohibit the installation of a slide. *See*, *Geier v. American Honda Motor Co. Inc.*, 529 U.S. 861, 120 S.Ct. 1913, 146 L.Ed.2d 914 (2000); *California v. ARC America Corp.*, 490 U.S. 93, 100-101, 109 S.Ct. 1661, 104 L.Ed.2d 86 (1989). CPSC established the "Safety Standard for Swimming Pool Slides", with regulations for materials,

strength and performance of slides and slide components, and warnings showing proper techniques for use of slides. 16 C.F.R. §1207. Notably, CPSC specifically stated it did not have the statutory authority to regulate installation of slides. 16 C.F.R. §1207.1. Although the standard applies to all pool slides, whether attached to above-ground, on-ground or in-ground pools, the standard never had any applicability to Hoffinger pools. Hoffinger could have warned that slides should simply *not* be installed with its pools. There is no possibility that a no-slide warning would conflict with mandated slide warnings.

In urging federal preemption, Hoffinger takes a stance totally inconsistent with its position that slides should not be installed with its pools. Hoffinger cannot shift the responsibility for safe design of its pools to the slide manufacturers and federal regulators of slides.

III. PETITIONER'S DUE PROCESS RIGHTS WERE NOT VIOLATED WHEN A JURY DETERMINED THE ISSUE OF DEFECTIVENESS

Hoffinger argues its rights to due process were violated by the fact that the court submitted the question of defectiveness of the product to the jury. The jury by their verdict found, under the "consumer expectation test" of manufacturers' products liability in Oklahoma, the pool was unreasonably dangerous, i.e. "dangerous to an extent beyond that which would be contemplated by the ordinary consumer who purchases it, with the ordinary knowledge common to the community as to its characteristics". *Kirkland*, 521 P.2d at 1362-63. It cannot violate due process for a jury to determine consumer expectations.

CONCLUSION

For the above reasons, Respondent respectfully requests that this Honorable Court deny the Petition.

Respectfully submitted,

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No. 02-515

IN THE
Supreme Court of the United States

DOUGHBOY RECREATIONAL DIVISION OF HOFFINGER INC., HOFFINGER INDUSTRIES,
Petitioners,

v.

KENNY COYLE,
Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of the State of Oklahoma

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5 PP

I. INTRODUCTION

Coyle's Brief in Opposition to this Petitioner's Petition for Writ of Certiorari, and the arguments and conclusions contained therein, ironically provides further support for granting the Petition. In opposing the petition, Coyle has embraced an incorrect view of preemption under the Consumer Product Safety Commission which requires further examination by this Court. Coyle's "defense" of the due process aspects of the proceedings below is equally deficient and underscores the necessity of further examination of the trial court proceedings in this case. As briefly discussed below, the Petition should be granted so that this Court can correct the grave errors committed by the state court below and reaffirm the fundamental importance of the right to a full cross-examination to the right to a fair trial under due process analysis.

II. COYLE'S BRIEF IN OPPOSITION HAS FAILED TO ADDRESS PETITIONER'S PREEMPTION ARGUMENT

Coyle has, somewhat characteristically, missed the point of petitioner's preemption argument. In making the blanket – and completely unsupported - statement that there can be no express or implied preemption of pools under the Consumer Product Safety Commission's standards regarding slides, Coyle unwittingly echoes the incorrect conclusions of law reached by the Ninth Circuit Court of Appeals in Leipart v. Guardian 234 F.3d 1063 (9th cir. 2000) and further illustrates why certiorari should be granted in this case. That Coyle makes such an assertion without bothering to provide factual or legal support for it should speak volumes to this Honorable Court, particularly given that Coyle makes this argument without even attempting to address or acknowledge the fact that the Consumer Product Safety Commission specifically rejected a requirement that slides not be placed with pools, the very

argument Coyle made in this case – In fact, Coyle's theories in the court below are directly contrary to the Consumer Product Safety Commission's determinations: that pool slides are permitted to be used in connection with pools; that pool slide manufacturers are the appropriate entities to shoulder a duty to warn in connection with the danger associated with slides; and, that the duty to provide warning signs related to the dangers associated with such slides were to be placed only on the slides themselves and nowhere else in the pool area.

Coyle argued for the creation of a common law duty to provide warnings which the Consumer Product Safety Commission considered and rejected as either unnecessary or ill-advised for safety reasons. Coyle's failure to acknowledge the clear conflict between the state standard and the Consumer Product Safety Commission's position, and his refusal to address the legal implications of that conflict, underscores the indefensibility of his position, buttressed as it is by the underlying acceptance of such flawed legal analysis that contained within the Ninth Circuit's decision in Leipart.

For the reasons amplified above, the Court should grant certiorari in this case so that this court may clarify the applicability of preemption analysis to the Consumer Product Safety Commission's standards generally and to the circumstances of this case specifically.

III. COYLE'S BRIEF FAILS TO JUSTIFY THE VIOLATIONS OF PETITIONER'S DUE PROCESS RIGHTS IN THIS CASE

Coyle's defense of the proceedings below with regard to petitioners due process argument is equally bankrupt of any substantive legal analysis. With regard to the pretrial settlement agreement between Coyle and the other trial defendants, the relevant question is whether the failure to

disclose that agreement to the jury and whether the failure of the trial court to allow cross examination on that issue to illustrate bias and prejudice of various witnesses - thereby preventing petitioner from exercising its fundamental right to cross examine witnesses - violates Petitioner's due process. *see* Ellis v. Capps, 500 F. 2d 225 (5th cir. 1974); Nevels v. Hanlon, 656 F. 2d 372 (8th cir. 1981); Greene v. McElroy, 360 us 474 (1959).

The question addressed by Coyle in his Brief in Opposition – whether the pretrial settlement agreement met the technical definition of a "Mary Carter" agreement under Oklahoma Law – was not one of the issues raised by Petitioner in its initial brief. The question with regard to that pretrial settlement agreement and its infection of the proceedings below is whether or not the right to cross examine witnesses is a fundamental right protected by the due process clause of the United States Constitution. If the right to cross examine witnesses is such a fundamental right, the lower court must be reversed, as it is undisputed that the trial court prevented proper disclosure to the jury and prohibited Hoffinger from cross examining any witness on the potential prejudicial effects of the pretrial settlement agreement on those witnesses testimony.

Accordingly, the Court should grant certiorari in order to clarify and underscore the importance of this fundamental right and to prevent such clear violations of due process rights as occurred in this case.

IV CONCLUSION

For the above reasons, and for the reasons set out in the Petition for Writ of Certiorari filed September 30, 2002, Petitioner respectfully requests that this Honorable Court grant the Petition.

Respectfully Submitted,

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